118-394-417

Office Supreme Court U. S.
FILED.
JAN 16 1886
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

No. 464.

COUNTY OF SANTA CLARA,

PLAINTIFF IN ERROR,

v.

SOUTHERN PACIFIC R.R. CO.,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

D. M. DELMAS AND
A. L. RHODES,
Attys. for Plff. in Error.

Supreme Court of the United States.

COUNTY OF SANTA CLARA, PLAINTIFF IN ERROR. *v.* SOUTHERN PACIFIC R.R. CO., DEFENDANT IN ERROR.	*No.* 464, *and* 620, 621, 622.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The principal features of the other causes which were advanced to be heard with this cause, Nos. 620, 621, and 622, are the same as those of this cause. There are some further facts which appear in one or more but not all of them, but they have no bearing upon the Federal questions involved in this litigation, and only present some State questions of no magnitude or real importance.

We will first notice the Santa Clara case.

This action was brought in the proper Superior Court of the State of California, for the recovery of taxes claimed to be due from the Railroad Company for the fiscal year 1882.

The complaint is in the form prescribed by the Political Code of the State, and demands a recovery against the defendant for the County taxes, the State taxes payable in

the County; also for the penalty of five per cent. which the law imposes for delinquency; also for the interest upon the taxes, and costs, and attorneys' fees at the rate of ten per cent.

The answer contains a general denial of all the allegations of the complaint. (Record, p. 3.) It also contains further defences, the purpose of most of which is to raise the Federal questions which it is contended are involved in this litigation; and it also presents a copy of the mortgage executed by the Railroad Company to secure the payment of bonds to the amount of $46,000,000. (Record, p. 18.) The defences need not be here stated in detail.

The cause was, upon the petition of the defendant, removed to the Circuit Court for the District of California, and was thereafter tried, and findings were filed by the Court, and thereupon judgment was rendered for the defendant.

An attempt to present at this time a summary of the findings would be of little service. It will be sufficient at this time to say that they show the incorporation and existence of the defendant, the Acts of Congress granting to it certain rights and property, and that in making the assessment of the property of the defendant the State Board duly conformed to the provisions of the laws of the State in all essential particulars.

The State Board of Equalization are by virtue of the provisions of the Constitution and Political Code of the State, the principal portions of which bearing upon the questions involved in this cause are hereafter recited, assessed the franchise, roadway, road-bed, rails, and rolling-stock of the railroad, at an aggregate sum which amounted to $15,000 per mile. The Board apportioned the amount among the several counties through which the road runs in proportion to the number of miles in the respective

counties, which apportionment gave to Santa Clara $889,500 for 59.30 miles of the main track of the road.

Upon that valuation the taxes, both for State and County purposes at specified rates, were duly levied.

The provisions of the Constitution and Statutes of California, so far as they are involved in this case, are as follows:

CONSTITUTION OF 1879.

ARTICLE XIII.

Revenue and Taxation.

SECTION 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership: *Provided*, That growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona fide* residents of this State.

SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon

the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof: *Provided*, That if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy of the preceding year.

SEC. 8. The Legislature shall by law require each taxpayer in this State to make and deliver to the County Assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at twelve o'clock meridian, on the first Monday of March.

SEC. 9. A State Board of Equalization, consisting of one member from each Congressional District in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office after those first elected shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The Controller of the State shall be *ex-officio* a member of the board. The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation: *Provided*, Such State and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe, as to the county assessments, and under such rules of notice as the State Board may prescribe, as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll,

and make the assessment conform to the true value in money of the property contained in said roll.

SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportionate to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

SEC. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article.

CONSTITUTION OF 1819.

ARTICLE XI.

SEC. 13. Taxation shall be equal and uniform throughout the State. All property in the State shall be taxed in proportion to its value, to be ascertained as directed by law. * * *

CONSTITUTION OF 1879.

ARTICLE XII.

(*Corporations.*)

SEC. 1. Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed.

CONSTITUTION OF 1849.

ARTICLE IV.

SEC. 31. Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

As Amended in 1880.

SEC. 3664. On or before the first Monday in May in each year the State Board of Equalization shall assess the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county. The president, secretary, cashier, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall furnish said board, on or before the first Monday of April, in each year, a statement, signed and sworn to by one of such officers, showing in detail for the year ending on the first Monday in March, in such year :

(*a.*) The whole number of miles of railway owned, operated, or leased in the State by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

(*b.*) Also a detailed statement of the number and value thereof, of engines, passenger, mail, express, baggage, freight, and other cars, or property used in operating or repairing such railway in this State, and on railways which are parts of lines extending beyond the limits of this State. The return shall show the actual amount of rolling-stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling-stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may in writing require.

If such officer or officers so designated shall fail to make and furnish said statement, said Board of Equalization shall fix the value and proceed to assess the property of the corporations so failing ; the valuation so fixed by them shall be final and conclusive. The said property shall be assessed at its actual value. Assessment shall be made upon the entire railway within the State, and shall include the right of way, road-bed, track, bridges, culverts, and

rolling-stock. The depots, station grounds, shops, buildings, and gravel beds shall be assessed by the Assessor of the County where situated as other property. On or before the fifteenth day of May, in each year, said Board shall transmit to the County Assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fix by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and-rolling stock of such railway within this State. Said statement shall be entered on the assessment roll of the county. At the first meeting of the Board of Supervisors, after such statement is received by the County Assessor, they shall make and cause to be entered in the proper record book an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the Board of Supervisors shall transmit a copy of each order of equalization to the City Council or Trustees, or other legislative body of incorporated cities or towns, the Trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. The taxes on said property, for State and county purposes, after collection by the County Collector, shall be paid over to the County Treasurer as other taxes. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxation districts.

SEC. 3692. In defining the powers and duties of the

State Board of Equalization, the section directs the Board:

Sub. 1. To provide rules for the transaction of business. * * *

Sub. 4. To hold regular meetings at the State Capitol on the second Monday in each month, and such special meetings as the chairman may direct.

§ 3608, (as amended in 1881.) Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment or taxation of such shares, and also of the corporate property, would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor.

The provision in relation to stocks was (by the amendment of § 3627, in 1880) to the effect that stock should be taxed only for the difference between its value and the value of the property of the corporation when the corporation had its principal place of business in that State.

§ 3617. Sub. 6, (as amended in 1881.) Demands, etc., for money deposited with savings and loan corporations, "shall for the purpose of taxation be deemed and treated as an interest in the property of the corporations, and shall not be assessed to the creditor or owner thereof."

§ 3629, (as amended in 1881.) Sub. 5 provides that the taxpayer shall give a description "of all mortgages, deeds of trust, contracts, and other obligations by which a debt is secured, and the property in the county affected thereby."

§ 3650, (as amended in 1881.) Duties of Assessor. Sub. 15. "When any property, except that owned by a railroad or other *quasi* public corporation, is subject to or affected by a mortgage deed of trust, contract, or other obligation by which a debt is secured, he must enter in the proper column the value of such security, and deduct the same. In entering assessments containing solvent credits, subject to deductions as provided in § 3628 of this Code, he must enter in the proper column the value of the debts entitled to exemption, and deduct the same. In making the de-

ductions from the total value of the property for taxation, each franchise must be entered on the assessment roll without combining the same with other property, or the value thereof."

§ 3663, (as amended in 1880.) Water-ditches constructed for manufacturing or irrigation purposes, and wagon or turnpike roads, or telegraph wires, with their franchises, and all improvements attached to such property, must be listed by the assessor as real estate, *and as a whole*, without separating the land and franchise and improvements, either in the description or valuation of the same.

§ 3899. Provides that "the Collector, after offering the property for sale once and there being no purchaser in good faith, must make out and deliver to the Controller a certified copy of the entries upon the delinquent list relative to such tax."

§ 3900. Provides that "in such action the certified copy mentioned in the preceding section, made by the Collector and delivered to the Controller, is *prima facie* evidence that the person against whose property the tax was levied is indebted to the people of the State of California in the amount of such tax."

§ 3789. The assessment book, duplicate assessment book, or delinquent list, or a copy thereof certified by the County Auditor, showing unpaid taxes against any person or property, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with.

Assignment of Errors.

Comes the said County of San Clara, and says that in the said record and proceedings there is manifest error in this, to wit: that by the record aforesaid it appears that said judgment was given for said defendant, and against said plaintiff, whereas by the law of the land it ought to have been given for the said plaintiff and against said defendant.

That the said Circuit Court erred in deciding that in the assessment of the property in question the said defendant in error was by the said State denied the equal protection of the laws.

That the said Circuit Court erred in deciding that in the making of said assessment the said defendant in error was by the said State deprived of its property without due process of law.

That the said Circuit Court erred in deciding that said defendant did not have due notice of the assessment in question in said cause.

That the said Circuit Court erred in deciding that said defendant did not have an opportunity to be heard in the matter of the assessment of its property, before the said State Board of Equalization, before said assessment became final.

That the said Circuit Court erred in deciding that the said State denied to said defendant the equal protection of the law.

That the said Circuit Court erred in deciding that said assessment or said tax was for any reason illegal or invalid.

That the said Circuit Court erred in rendering judgment on the findings for the defendant.

Said plaintiff prays that said judgment be reversed, and that judgment be ordered to be rendered and entered upon the findings for the plaintiff.

ARGUMENT.

The Circuit Court rendered judgment upon the findings of fact in favor of the defendant on the principal grounds:

1st. That the Constitution of the State denied to the defendant the right to have deducted from the value of the railroad property as assessed, the value of a mortgage

upon said property, while that right was by the Constitution secured to all persons, except *quasi* public corporations, and that thereby the State denied to the defendant the equal protection of the laws.

2d. That such assessment was made and became final, without any notice to the defendant, or any opportunity to be heard before the State Board of Equalization, and that this amounted to a deprivation of the defendant of its property, without due process of law,—it being held that in both of those respects the revenue system of the State was in contravention of Sec. 1 of the XIVth amendment of the Constitution of the United States.

We contend, and trust that we shall maintain, that the Circuit Court erred in both of those respects—that in truth the revenue system of the State does not conflict with any of the provisions of the first section of the fourteenth amendment of the Constitution of the United States.

I.

The Power of Taxation is an attribute of sovereignty, and is essential to the existence of every independent government.

All the methods of taxation are within the power of the State.

Cooley on Taxation, 273.

The power of the State over the whole domain of taxation is absolute and unlimited, as regards property subject to taxation by the State.

The Delaware R.R. Tax, 18 Wall., 226.
Lane County v. *Oregon*, 7 Wall., 76–7.
Nathan v. *Louisiana*, 8 How., 508.
Cooley on Taxation, pp. 175, 177, 179.
Scoville v. *Cleaveland*, 1 Ohio St., 126.

Barney v. *Tax Collector*, 2 Bailey, 654.
Thompson v. *Pacific R.R.*, 9 Wall., 591.
Coite v. *Society of Savings*, 32 Conn., 184.
Coite v. *Mutual Life Ins. Co.*, 36 Conn., 512.
City of Lexington v. *McQuillan*, 9 Dana, 615.
Railroad Co. v. *Penniston*, 18 Wall., 29.
State Tax on Foreign Held Bonds, 15 Wall., 319.
Oliver v. *Washington Mills*, 11 Allen, 268.
Weston v. *Charleston*, 2 Peters, 467.
McCulloch v. *Maryland*, 4 Wheat., 316.

The possession of the power to raise money by taxation, from all persons and property, within and subject to its jurisdiction, is as essential an element of sovereignty as the power to appropriate the money after it has been collected. A State deprived of this power is a mere shadow, unworthy of the name of a State. It would be as helpless and worthless as would be a State which was deprived of the power of appointing its own officers. Had it been understood at the time when the 14th Amendment was proposed, that it abrogated, or materially impaired or affected, the sovereign power of taxation by the several States, we will venture the assertion that not a member of Congress, or of the Legislature of a State, could have been found, whose hostility to the extreme doctrines of States rights was so virulent as to induce him to support the amendment.

The principle that the State is sovereign in all matters of taxation—save only as to those matters that grow out of the relation between the General and the State Governments—needed not the aid of the great names of those who participated in the decision of McCulloch *v.* Maryland, and the Delaware R.R. Tax Cases, and others above cited; for it ante-dated not only all American constitu-

tional law, but English constitutional law as well. It inheres in the very idea of sovereignty.

It should not fail to be noticed in this connection that the last Section of Art. XIV provides that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." As deducible from that section, as it stands related to the other sections of the article, we lay down the proposition that Congress could modify or abrogate any State law in derogation of the provisions of that article. Congress has interfered for the protection of freedmen, but not, so far as we are aware, for the protection of a class or kind of property from the operation of a discriminating revenue system of any State, however injurious it may be supposed to be.

Knowing, as well as the "Great Commoner" must, the necessary operation and effect of the amendment, and the revenue system of his own State, Pennsylvania, is it not unaccountable that he does not appear to have made an effort to have the revenue system of his State amended for the purpose of bringing it into harmony with the 14th Amendment, nor to have introduced or aided in the passage of laws of Congress for the same purpose. It is a matter well known to every one who is familiar with the revenue systems of the several States, that discriminating taxes, in their various forms, are levied upon the franchises, gross profits, etc., of corporations in Pennsylvania, to such an extent that real estate bears only a very small burden of taxation.

Give to the amendment the construction and meaning contended for by the defendant, take from the States the essential element of sovereignty in the matter of taxation of property subject to their jurisdiction, and we may have left to us United Provinces, but not United States.

II.

The XIVth Amendment of the Constitution has no Application to the Revenue Systems of the Several States.

The term "the equal protection of the laws" is not defined in the Constitution, nor in any other place, so far as we are aware, from which it might have been borrowed. It cannot have been intended as meaning that all State laws should operate alike upon all persons within the State. Had that been the intention, the words which are so obvious to every one would have been employed, to wit: all the laws of the State shall be general, and shall have a uniform operation. The phrase has a more limited sense. All laws are not intended for the protection of persons, in the more proper sense of that term. A law defining the boundaries of counties, or providing a system of county governments, or organizing the militia, or providing for homesteads, or providing for the levy and collection of a tax to build a school-house, State land laws, statute of uses, etc., and many others that will readily be suggested, do not come within the meaning of that term as there employed. To have the benefit of the equal protection of the laws, a person must have the right to sue and defend in the courts, to have the aid of process, to have the assistance of the judicial and ministerial officers, to have the aid of officers in the execution of the criminal laws, to give testimony in the courts, to have the benefit of the writ of *habeas corpus*, and the like. We will not assume the dangerous task of defining a term which is new to constitutional law, but would say that laws, the purpose of which is the protection of life, liberty or property, will come within the meaning of those words; but that a law

providing for a poll-tax, or the rate of the State or a county tax, or for the assessment of property, would not.

In the discussion in the Circuit Court, much reliance was placed on the Civil Rights Bill, as re-enacted after the adoption of the 14th Amendment, (see R. S., S. 1977,) as giving expression to the meaning of the amendment. We are unable to agree to the meaning there given to that act. As we read it, the last clause declares that all persons within the jurisdiction, etc., "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind [as white citizens] and to no other." That is to say, that in those respects citizens recently emancipated should stand upon an equality with white citizens; that they should possess the right to make and enforce contracts, to sue, be parties, give evidence, etc.

If it was intended as meaning that all persons should be subject to the same taxes, licenses, and exactions, we deny the authority of Congress to pass the act. Not a shadow of authority for the exercise of such power is to be found in any clause of the Constitution, nor in any combination of them.

No system of revenue laws ever has been devised, and it is beyond the wisdom of man to devise one, involving taxes upon property, income taxes, licenses, poll-taxes and the like, that will operate alike upon all persons. But if it be said that the meaning is, that it shall operate alike upon all of the same class, then we have no objection to the act, except on the ground that it was utterly beyond the constitutional power of Congress to pass it. We do not object to the equal operation of the law upon *all of the class.* We claim the right, on the part of the State, to form the class. Neither Congress nor this Court can perform that function.

III.

THE DEFENDANT WAS NOT DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW; ON THE CONTRARY, IT HAD DUE NOTICE OF THE ASSESSMENT BY THE STATE BOARD OF EQUALIZATION.

In matters of taxation for revenue for general governmental purposes, the property-owner has not a constitutional right to notice and a hearing before the charge of the tax is fixed upon his property.

Cooley on Taxation asserts that he has this right, and cites several cases in support of the position; but no one of them, nor any of the cases cited by the defendant sustains the position. All the cases cited by the defendant involve assessments for local improvements.

That question is set at rest by Murray's lessees *v.* Hoboken, (18 How.)

The proposition is not sustainable on principle.

The property-owner is not entitled to notice of the fixing of the rate of the tax; and it is that legislative act which initiates the lien upon the property.

Nor of the levy of the tax, which perfects the lien upon the property.

Taxes upon the gross receipts of railroad companies are levied in Pennsylvania; taxes upon insurance premiums are levied in Massachusetts; and taxes upon deposits in savings banks are levied in Connecticut; and it was never contended that they were void because the owners of either of those kinds of property were not notified before the levy became fixed.

Boards of Equalization may increase the valuation of all property within their respective counties. Was it ever contended that the property-owners must be first notified? (See State R.R. Taxes, 92 U. S., 575.)

The levy of a tax is not a hostile proceeding—it is not an exaction.

The Assessor as much represents the tax-payer as does the Representative in the Legislature.

Notice and an opportunity to be heard were given by the Constitution of the State, and by the Code as it existed in 1880. (Pol. Code, § 3664, and by the Code as amended in 1881.)

The Political Code, § 3692, provides that the State Board of Equalization shall have power to provide rules for the transaction of business; * * * to hold meetings at the State Capitol on the second Monday of each month, and such special meetings as the chairman shall direct.

Section 3664 (as amended in 1880) requires that the president, managing agent, etc., of the railroad company furnish the State Board of Equalization with a detailed statement of the property of the R.R. Co.; that the statement shall be sworn to by such officer; and that it shall be filed on or before the first Monday in April of each year. It also requires the State Board to assess the property on or before the first Monday in May, and to transmit to the several county assessors, on or before the 15th day of May in each year, the apportionment of the valuation of the railroad property among the several counties through which the railroad runs.

Beyond all doubt or question, *all persons are notified of the time and place appointed by law for the performance of these several acts.*

When the law fixes the time and place of the meeting and session of a public Board or tribunal, it is idle for any person to say that he had no notice of such meeting or session. The law itself imparts the notice. The denial by the defendant of notice is to be read in connection with the law above cited; and we do not understand the de-

fendant as averring that it did not have the notice which is imparted by the above cited laws, but only that it had no other or additional notice.

The railroad companies are required by those provisions to furnish a detailed statement of all property pertaining to the railroad operations.

This statement is to be presented to the Board by the 1st Monday of April.

If the statement may be regarded as in the nature of a pleading in a proceeding before the State Board of Equalization, then the company presenting it must take notice of the meetings of the Board.

The Board being a State Board, its place of meeting is the State Capitol.

Political Code, § 3692, provides that the Board shall hold its meetings at the State Capitol, and on the 2d Monday in each month.

It is urged that as the Board may assess the railroad property on or *before* the first Monday in May, and as the R.R. Co. is required to furnish the statement of its property on or before the first Monday in April, the Board might assess the property before the expiration of the time given for the filing of the statement. We admit that it is *physically* possible for such an assessment to be made, just as we would say that it is physically possible for this Court on the first day of its term to affirm the judgment in every cause on the calendar. The same presumption will be indulged in each case—that the Board, as well as the Court, will perform its duty.

The question of the validity of the Constitution and Statutes of the State, in the matter of notice to the taxpayer, and an opportunity to be heard, was long since fully settled by this Court in

State R.R. Taxes, 92 U. S., 575,

and in the recent decision in The Kentucky Tax Cases.

The Amendment of 1881 gives the Railroad Company five days after the assessment is made by the Board within which to appear and have the same corrected in any respect. The company must take notice of the assessment; and cannot complain if it neglects to avail itself of its right to appear before the Board and have the assessment corrected, if wrong in any respect. The company, after having presented its statement, has no better ground to complain of want of notice than has a plaintiff after having filed his complaint in a court.

The amendment of 1881—amendatory of Pol. Code, § 3664—is valid.

It is attested by the signatures of the presiding officers of the respective Houses, and has the approval of the Governor, and the Act is duly enrolled, and is on file in the office of the Secretary of State of California.

The Code provides that the several County Assessors shall, between certain specified days, ascertain and assess all the taxable property within their respective counties, and return their assessment lists on or before the last mentioned day; and no other or further notice is required to be given to the property owner of the time of the assessment; and this has always been the law in California, and its validity has not been denied; nor is there any ground upon which it can be questioned.

The statutes of many States have been examined, and we have not noticed any which provides for any other notice of the proceeding to make the assessment, than such as is imparted by the law fixing the time. A publication or a posting of a notice of the time within which the assessments will be made, is, in no legal sense, any more notice to the property owner than is the statute fixing the time.

The Code fixes the time during which the County Board

of Equalization may remain in session, when property-holders may present objections to the assessments; and it provides that the Clerk of the Board shall publish a notice stating such time, when the Board will act as a Board of Equalization. A taxpayer may insist on such publication of the notice, *simply because the Code so requires;* but if such provision had not been made for publication, he could not be heard to say that he had no notice—that he was not required to take notice of the provisions of the statute fixing the time when the Board is required to act as a Board of Equalization.

It will also be noticed that Sec. 3664 requires the President or the Managing Agent, etc., of the Railroad Co. to furnish to the State Board a statement in detail, showing the value of the railroad property. This statement is evidence before the Board; and we are justified in saying that it is more than evidence. It is in the nature of a pleading. The Board acts upon it, and it is evidence upon which the Board acts in estimating the value of the property.

When a party has thus appeared before a Board, he has the right, unless the law expressly denies it, to supplement or corroborate the facts appearing in the statement in the usual manner. He may offer his evidence then and there, or at such future time as the Board may appoint. His right so to appear is as unquestionable as that of a party who is required to appear and answer in a court, whose terms are fixed by law.

This is not like the case of proceedings before a special tribunal or Board, whose meeting are only at such times as the tribunal or Board appoints.

The State Board is a public board; certain of its sessions are fixed by law, and of those all persons must take notice; its records are public records, and of them, also, all persons must take notice.

The proposition may confidently be laid down, that if a person is notified by the law of the time when a Board may act, and he is required by law to appear before the Board and file a written and verified statement of matters relating to his own property, he will be deemed to have the requisite notice to appear, and an opportunity to appear before the Board, respecting the matters to which the statement relates. The defendant must be held to have had the requisite notice.

This is well illustrated by the provisions of the law regulating elections. A proclamation is required to be issued and published, yet it has uniformly been held in this State, and in many others, that an election for a full term of office, at the time appointed by law, was valid and legal, though no proclamation had been issued or published; that the law fixing the time of election, and the term of office, was sufficient notice to the electors.

Assessments for the improvement of streets, etc., in muncipalities, are taxes, though not coming within the category of *ad valorem* taxes provided for by the Constitution of California, and that of many other States. In San Francisco, jurisdiction to improve a street is acquired by the publication by the Board of Supervisors of a declaration of intention to make such improvement. Specifications are then made by the engineer; the Board advertises for sealed proposals for the doing of the work, the bids are opened, and the work is awarded to the lowest responsible bidder; the Superintendent of Streets enters into a contract with the person to whom the work is awarded; upon the performance of the work to the satisfaction of the Superintendent of Streets, an assessment is made, levying the cost of the work upon the adjacent lots, in proportion to the frontage of the lots—and this assessment is in almost every instance made to *unknown* owners; the Superin-

tendent of Streets issues to the contractor the assessment and a warrant for its collection. Up to this time, no notice is issued to the lot owners. They have no voice in determining whether the improvement shall be made, nor the amount that is to be paid therefor, though the several lots are charged with a lien, the amount of which is ascertained by a measurement of the frontage of the lots and an arithmetical computation. The Constitution of the State has always contained the provision as to "due process of law," but these proceedings, if regular in form, have invariably, and in almost numberless cases, been upheld by the Supreme Court of the State.

This question is completely set at rest by

The R.R. Tax Cases, 92 U. S., 601.

In that case the property was railroad property; it was assessed by the State Board of Illinois; the law, and that alone, gave notice of the sessions of the Board; and it was held that the tax was not invalid for want of notice to the R.R. Co.

See also

Cooley on Taxation, 266.

The principles involved in the constitutional provision of "due process of law" do not require that the party shall have an opportunity to be heard after the assessment is made. The statute in some States, and perhaps in most, provides for a hearing before a board having powers of equalization, but no one can claim, as a constitutional right, that there shall be such a board, or that if there be such a board, that it shall have the power of reviewing all assessments, however made. See

The R. R. Tax Cases, supra.

Statutes providing for Boards of Equalization are so numerous that it is sometimes said, though incorrectly,

that this constitutes an essential element of due process of law in a revenue system. But those boards are of comparatively recent origin, and are not essential.

The State Board may increase the valuation of all property in a given county, but no one will claim that he is entitled to any notice other than such as the law gives. Should a County Board decrease the valuation of a parcel or a number of parcels of property, it would result in enhancing the tax upon other parcels; but it never was claimed that the owners of those other parcels could demand any notice other than such as the law gives, by fixing the sessions or the term of the Board.

Complaint is made by the defendant to the effect that it was denied "due process of law" because it could not appear before the County Board of Equalization, and because the law did not provide a board of equalization with power to act in respect to this class of property. Very few if any Boards of Equalization were provided for, until long after the provision that no person shall be deprived of property "without due process of law" found a place in the American system of constitutional government.

No one has a legal right of appeal to a board of equalszation, unless the State Constitution or Statute creates such Board, and grants such right of appeal.

Stewart v. *Maple*, 70 Pa. St., 223.
The State R.R. Tax Cases, 92 U. S., 601.
McMillen v. *Anderson*, 95 U. S., 601.
The Delaware R.R. Tax, 18 Wall., 207.

THE STATE BOARD IS CONSTITUTED A BOARD OF EQUALIZATION FOR THIS CLASS OF PROPERTY.

This was so held in

S. F. & N. P. R.R. Co. v. *State Board*, 8 Pac. C. L. J., 1061.
C. P. R.R. Co. v. *State Board, Id.*, 1072.

Those cases also hold that the Board has power to prescribe rules of notice, and that if general rules have not been prescribed, the Board may prescribe a rule *for a particular case.*

An application by the party desiring the hearing on appeal, must of course be made to the Board before it could prescribe a rule for that case.

IV.

The Defendant is not deprived of the equal protection of the Law.

The defendants contend that the revenue system of the State deprives them of the "equal protection of the law," but their contention is without support. It is based mainly upon the fact that the Constitution of the State, Art. XIII, Sec. 4, provides that "a mortgage, deed of trust, contract, or other obligation, by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby;" and further provides that as to all property-owners, except railroads and other *quasi* public corporations, the valuation of the property shall be divided between the mortgagor and mortgagee in proportion to the value of their respective interests in the property; while the Constitution does not permit this division as between mortgagor and mortgagee of railroad property. Under the Constitution and laws of the State, the property of railroad companies, operating their roads in more than one county, is required to be assessed as a unit.

The constitutional power of the State to assess railroad property in that manner is beyond all question.

THE CONSTITUTION OF CALIFORNIA DOES NOT PROVIDE FOR THE DEDUCTION OF THE VALUE OF A MORTGAGE, DEED OF TRUST, &C., FROM THE VALUE OF THE PROPERTY AFFECTED THEREBY; BUT ONLY FOR A DIVISION OF THE ASSESSED VALUE OF THE PROPERTY BETWEEN THE MORTGAGOR AND MORTGAGEE.

The only difficulty that was encountered in disposing of this question had its origin in the misapplication of terms.

The DIVISION of the valuation of property, as between the mortgagor and mortgagee, was called a DEDUCTION of the value of the mortgage from the value of the property; and it was thereupon claimed that a refusal to make such deduction in case of railroad property was a deprivation of the railroad company of the equal protection of the law.

As the law provides for a division—not for a deduction—the objection fails.

The only deduction provided for by the revenue system of the State is a deduction of the debts owing by the property-holder from the amount of the debts due to him; and a deduction of the value of shares of stock where the whole corporate property is assessed.

In discussing this question, it is immaterial whether taxation of property in that State is a tax *in personam*, or a tax *in rem*.

It was provided by Sec. 13, Art. 11, of the former Constitution that "all property in this State shall be taxed in proportion to its value."

The 1st Sec. of Art. 13 of the present Constitution provides that "all property in the State not exempt," &c., "shall be taxed in proportion to its value."

The judicial history of the State shows that there was a long and earnest controversy over the question whether,

under the former Constitution, a debt secured by a mortgage was subject to taxation; and it was finally decided in

People v. *Hibernia Bank*, 51 Cal., 242,

that it was not subject to taxation. The principal ground upon which the decision proceeded was, that to tax the property subject to the mortgage and the debt secured by the mortgage, would be duplicate taxation. Of course such taxation was not double as to the person, but only as to the property.

In order to set the question completely at rest, and to provide that the debt secured by a mortgage, deed of trust, &c., should bear its proper burden of taxation, *where it was deemed feasible*, the first Sec. of Art. 13 of the present Constitution declared that "property" as used in that article should include "moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

It is apparent that the assessment of all the above classes of property, at their full value, would result in duplicate taxation. Instead of leaving the matter entirely in the hands of the Legislature, the Constitution undertook to deal, to some extent, with it; and accordingly provided —Sec. 4—that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby;" and the section further provided that each should be separately assessed,—that the interest in the property represented by the mortgage, deed of trust, etc., should be assessed at its value, and that the property thereby affected should be assessed at its value, less the value that was given or allotted to the mortgage or deed of trust.

This is no deduction from the value of the property.

Its whole value is represented on the assessment list, but it is *divided into two parcels*, one representing the mortgage interest, and the other the value of the mortgaged property, less the value of the mortgage. The property is assessed—valued—only once, but for the purpose of taxation it is divided into two parcels. Had the Constitution or the Statute provided, as might have been done, that an estate for years in real estate should be separately assessed at its value, and that the estate in fee should be assessed at its value, less the value of the estate for years, no one would recognize in such a system anything but a *division* of the value of the real estate between the several estates therein. Nor would it make any difference in the result, had the words of the Constitution or Statute been that the value of the fee shall be ascertained by taking the whole value of the real estate, and *deducting* therefrom the value assessed to the leasehold interest. Here, instead of the lease, the Constitution declares that a mortgage shall be deemed an interest in the property; and provides that it shall be assessed at its value, and the remaining interest shall be assessed at the whole value of the property, less the value of the mortgage. This is not a deduction from the value of the property, but only a division of the property and of its value; a distribution of its value among the several interests therein.

The Circuit Court fell into an error in regarding this division of the value of property, as between the mortgage interest and that of the owner of the property, as a process by which property was to be assessed at less than its value—by which a deduction was to be made from the value of property for the purpose of taxation. It is simply a process by which two interests or estates in property are separately assessed.

The only just ground of complaint in respect to an assess-

ment, in case there are several interests in the property, is of duplicate assessment. If the property, however subdivided, is assessed but once, there is no valid objection to it. In the case above supposed, a party would not be listened to for a moment who complained that for the purpose of assessment the real estate had been divided between the two interests therein—the leasehold and the fee. Nor would the owner of personal property, who complained that the several interests therein were not divided into two interests, as it would have been had it been real estate subject to a lease.

The estate of each tenant in common in land is usually assessed separately, but in the absence of some special provision it is difficult to conceive of a valid objection to either mode—that is, to an assessment of each interest, or an assessment of all the interests together. But should the Constitution or the Statute provide for the assessment of each interest separately, we see no ground of objection that could be maintained in behalf of a partnership or a joint ownership of personal property, on the ground the separate interests therein of the owners had not been separately assessed, as was the case with land.

This constitutional process of division is not in any sense a deduction from the value of property.

When property has not been subjected to duplicate taxation, or to an excessive valuation as compared with other property, its owner has slight ground of complaint. Neither of these grounds are sustainable upon the law applicable to the facts averred in the answer. As already stated, the Supreme Court of the State held that the former Constitution did not permit duplicate taxation; but it being the purpose of the framers of the present Constitution to subject mortgages to taxation, so far as in their opinion it was feasible, they constructed the 1st and 24th sections

above referred to for that purpose; and in order to avoid duplicate taxation, they constituted the mortgage a part of—an interest in—the property affected thereby. And thus dividing the property into two parts, duplicate taxation was avoided.

We say: as far as in their opinion it was *feasible*, for it is manifest that by no official skill and diligence could a proper assessment be made of such a mortgage as is alleged here. The mortgage covers right of way, road-bed, track, rolling-stock, and the appurtenances of a road over 700 miles in length, with its side-tracks, depots, stations, etc., situated in a large number of counties, States, and Territories, and also all the lands granted to the company, of which it was or might be the owner. It would be idle and farcical to impose the duty of assessing such property and such a mortgage upon the several County Assessors; and the framers of the Constitution may well have believed that no State Board could properly divide and adjust the valuations, as between the railroad property and such a mortgage. It being impracticable to divide the value of railroad property, subject to a mortgage, as might be done as between a farm and a mortgage upon it, provision was made that the railroad property should be *assessed as a unit.*

There is no ground of complaint here that this property has been subjected to duplicate taxation. It not only is not alleged that the mortgage was assessed, but we say that under the Constitution it is not possible to assess it. The whole of Sec. 4, Art. 13, must be read together, in order to ascertain its meaning. Thus read it is: that a mortgage, deed of trust, etc., except those made by railroad and other *quasi* public corporations, shall be deemed an interest in the property, &c., and shall be assessed to the owner thereof, &c. Unless the property can be di-

vided as between its owner and the owner of the mortgage, the mortgage is not to be assessed, and their being no provision for such a division in case of railroad corporations, but it being by implication forbidden, there cannot be an assessment of the mortgage upon the property of railroad corporations.

This is virtually set at rest by the Supreme Court of the State. The first Section of Art. 13 enumerates, as property subject to taxation, stocks. The Legislature, in order to avoid duplicate taxation, provided by the Political Code, Sec. 3640, as amended in 1880, that the value of the shares of the capital stock of corporations shall be ascertained by deducting the whole value of the corporate property from the value of the whole stock, and dividing the remainder by the whole number of the shares. In

Burke v. *Badlam*, 57 Cal., 594,

the court held that the Constitution does not authorize double taxation, and that to assess all the property to the corporation, and the shares to stockholders, would be double taxation.

This doctrine was affirmed in

Miller v. *Heilbron*, 58 Cal., 134.

As the whole railroad property is required to be assessed as a unit, and as the Constitution does not permit duplicate taxation, it follows that the mortgage cannot be assessed.

The objection so far as the mortgage is concerned is, that the Constitution has failed to provide for the division of the value of railroad property into two parts for the purposes of taxation, the one representing the value of the mortgage and the other the value of the railroad property, less the value of the mortgage—in other words, that the Constitution requires such property to be assessed as a unit.

The Political Code—in § 3650—in describing the process by which the value of property affected by a mortgage is to be divided, as between the interest in the property represented by the mortgage and the remaining interest, directs the Assessor to deduct the value of the mortgage from the whole value of the property; and that term is proper, as descriptive of the mere arithmetical process performed by the Assessor; but the term is calculated to mislead. There is nothing in that or any other section of the Code, nor in the Constitution, showing an intention to exempt the value of the mortgage from taxation in any case where this so-called deduction is provided for.

The question whether a person has any constitutional ground of complaint because the law requires particular property to be assessed as a unit, instead of being subdivided, will hereafter be noticed.

Take the Central Pacific R.R. Co. as an illustration of the impracticability of dividing the property between mortgagor and mortgagee. The lien of the United States is virtually a mortgage upon the whole road for twenty-seven million dollars. Of course the interest of the mortgagee is beyond the reach of State taxation. There was another mortgage for the same amount given to private parties to secure bonds of the R.R. Co. to the same amount. Also another mortgage of ten millions upon the land grant.

The mortgages covered road built and to be built; road within the State and road without the State; lands earned and unearned, patented and unpatented, lands within and lands without the State. The bonds secured by the mortgages were or might be held, when issued, in every mart in the commercial world. An attempt to divide the assessed value of the railroad property between the railroad company and the holders of these would be futile, if not absurd.

There was another cogent and sufficient reason why an attempt at a division as between mortgagor and mortgagee of railroad property should not be made, and that is found in the fact that the railroad mortgages contain a covenant for the payment by the railroad company of the entire taxes upon the railroad property.

If the system operates as a discrimination, it is in favor of the railroads and against all other taxpayers. Were they taxed as others are, the tax upon their mortgages alone would amount to three times as much as they now are.

V.

Classification of Property for the Purpose of Assessment and Taxation.

While operating under the rule of equality and uniformity, this process has constantly been going on, and invariably maintained by the courts. It is everywhere upheld as one of the customary and usual modes of procedure in ascertaining values for the purpose of taxation. On principle, there is no better objection to it than there is to the division of all the property of the State by County, District, or Township lines.

If this power of classification of property exists, its exercise—the time, extent, and manner of its exercise—must be in the discretion of the State. While we agree that there must be some basis upon which the classification must rest, it is not competent for any other authority to say that the one selected is not the best. For the purpose of the classification of persons to be subjected to a poll tax the State may first exclude females, and of the males, exclude those who are under twenty-one years, and those above sixty years.

It is possible, by exclusion of classes of persons and the enumeration of conditions, to reduce the persons to a single family or person—but that would be a mere sham and not a classification—and an assessment based on such proceedings would be an arbitrary exaction. But there is nowhere power or authority to supervise, review, or in any manner invalidate such a classification as first above supposed, even though the better opinion should be that the class should not include those above fifty years, or should include all not exceeding seventy years. In other words, there is no power or discretion involved in this matter except that which pertains to the State.

The Statute of Maine provided that land held by R.R. companies should be "holden and considered as personal estate." Statute upheld in

Bangor, etc., R.R. v. *Harris*, 21 Me., 533.

"Rolling machinery to be assessed as real estate" in Indiana. See

Louisville, etc., R.R. v. *The State*, 25 Ind., 177.

Track and superstructure of R.R. shall be denominated fixed and stationary personal property. Statute of Illinois. See

Maus v. *Logansport, etc., R.R.*, 27 Ill., 77.

The taxes on railroad property in Kansas were required to be collected as taxes on personal property.

Gulf R.R. Co. v. *Morris*, 7 Kan., 210.

In Massachusetts the property of minors under guardianship is assessed to the guardian in the town of guardian's residence. Property held in trust assessed to *cestui que trust* in his town.

Bourne v. *Boston*, 2 Gray, 496.

In New York, surplus profits and reserve fund of mutual companies are taxed as capital.

People v. *Supervisors*, 16 N. Y., 424.

In Indiana, the railroad track, rolling machinery, and all property used in operating the road, required to be assessed as *a unit* by Board of Assessors of the several counties through which railroad runs.

Toledo, etc., R.R. Co. v. *Lafayette*, 22 Ind., 269.

In Illinois the system is quite similar to that of Indiana, except that the property is to be assessed by a State Board.

State R.R. Tax Cases, 92 U. S., 601.

In other instances the capital stock of the corporations is required to be assessed, in others the shares of stock, in others the dividends, in others the surplus funds, and certain other specified property.

The Constitution of California, Art. 13, S. 10, provides that the "franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties," etc., and that "all property," except as above mentioned, "shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law."

This is a distinct classification of property for the purpose of assessment. The State has as competent a power to make it, as Pennsylvania had to provide for different modes of assessment of seated and unseated lands; or as Indiana had to provide for a separate assessment of all real estate. The State has made that classification and provided that mode for the assessment, and on no con-

ceivable ground, derived from the Constitution of the U. S. or from the "due process of law" of the State Constitution, or from its requirement of equality and uniformity, can the exercise of this authority be questioned.

It seems to be conceded on the part of the defendant that the State has competent power to make a classification of property for the purpose of assessment, but says that the classification is not maintainable because it does not include all railroads, that is, railroads operated in only one county. The exercise of discretion in that respect by the State—and there must in all cases be such an exercise of discretion, for property, as to its conditions, situation, &c., does not classify itself—is not subject to review by any power. We may be of the opinion that the classification made by the Constitution is not the most judicious, that all personal property should have been arranged in one class, instead of selecting solvent credits alone and those not secured by a mortgage, etc., as the property from which should be deducted debts due to *bona fide* residents of this State, as is provided in Sec. 1, Art. 13.

It may be that the framers of that instrument were satisfied that there were sufficient reasons why the property of railroads operated in more than one county could not, with any reasonable accuracy, be valued by the assessor of one county; that he could not properly perform his duty in that respect without the examination of property situated without his jurisdiction, while he might assess the property of a road operated only in his county. But it is palpable that no one but a State officer or Board could properly and correctly make the valuation. The State, in the exercise of its discretion, has determined that it shall be classified and assessed as prescribed in Sec. 1; and such exercise of discretion is beyond the reach of question The submission by the State to a review in that regard would be a surrender of sovereignty.

The Constitution and the statutes of this State present several instances of classification of property for assessment.

Stocks issued by corporations are subject to taxation, (Art. 13, Sec. 1 ;) but the Legislature, by Sec. 3608 of the Political Code, provides for the assessment of the property of corporations, and that when so assessed the stock shall not be assessed also.

" Credits secured by mortgage or trust deed " constitute one class, and those not so secured constitute another; and the latter are again divided, so that one class may, and the other may not, have the benefit of a deduction of debts due to residents of the State. (Art. 13, Sec. 4.)

By Sec. 2, land and its improvements are to be separately assessed. Long prior to the adoption of the present Constitution, improvements were defined by Sec. 3617, Political Code, as including buildings, structures, fixtures, and fences erected upon or affixed to the land, and all trees and vines not of natural growth. As those constitute a part of the land in a legal sense, the above division is a classification for the purpose of assessment.

By Sec. 3, tracts containing more than 640 acres shall be assessed in one form, while tracts not sectionized must be assessed in another form.

By the provision of Sec. 4, all property affected by a mortgage, deed of trust, contract, or other obligation, except that of *quasi* public corporations, is constituted one class ; and all property of *quasi* public corporations which is affected by a mortgage, etc., is constituted another class. The first class, for the purpose of assessment, is divided into two parts or parcels ; the one being an interest in the property equal to the value of the security, and the other being the whole value of the property, less the value of the security. The second class—that of *quasi* public cor-

porations—is not subdivided into two classes for that purpose, and that, too, for reasons which commended themselves to the judgment of the State.

In respect to the first class, there is no exemption of any property, or of any part of the property, from taxation, nor is there any deduction from the value of the property to be taxed or assessed. It is a misnomer to call the separate classification, assessment, and taxation of the mortgage interest, a deduction. It is simply and only a division of each parcel of such property into two parts—the one represented by the mortgage interest, and the other represented by the fee, less the mortgage interest. It is divided, as it might be, did the mortgage in fact convey an interest in the property. The section declares that, for the purpose of assessment, the mortgage shall be deemed a conveyance of an interest in the property to be measured by the value of the mortgage. The operation and effect of that provision is no different than would be a constitutional or statutory provision declaring that in case land or other property is held under a contract of purchase, the interest of the purchaser should, for the purpose of assessment, be deemed to be an interest in the property, to be measured by the proportion of the purchase money that had been paid, and that the interest of the vendor should be deemed to be the remainder, as measured by the unpaid portion of the purchase money. Nor does it differ from a provision that might be made to the effect that the several estates in land—that of the sub-tenant, the tenant for years or for life, and the reversion or the remainder—shall severally, for the purpose of assessment, be deemed interests in the land.

In the cases supposed there is neither an exemption nor a deduction, but simply a division—a classification—for the purpose of assessment. All of the interests in the

property are severally assessed, *and the whole property is only once assessed.*

For the purpose of assessment, railroads are, as already stated, merely divided into two classes, the one being those which are operated in one county, and which are required to be assessed by the County Assessor, and the other being railroads operated in more than one county, and which are to be assessed by the State Board of Equalization.

There is here no more just ground of complaint—no better cause to complain, as does the defendant, of wrong, oppression, unjust discrimination, taking property without due process of law, confiscation—than has the owner of land in fee to complain that the estate for years in his land is not separately assessed, or than has a partnership that the property is assessed to the firm instead of its members.

The matter of classification of property for the purpose of assessment is not a recent innovation in the revenue system of this State. It has obtained from the organization of the State government, and that, too, while the Constitution has always provided that taxation shall be equal and uniform, and that no person shall be deprived of property without due process of law.

By the Revenue Act of 1850, the personal property of corporations was to be listed in the county in which was the principal place of business of the corporation. Its stock was not to be assessed if its capital was liable to taxation. Toll bridges and ferries were to be assessed where the tolls were collected, and in certain cases where the treasurer of the corporation resided. Personal property, mortgaged or pledged, was deemed the property of the person having its possession. Real estate was deemed the property of the mortgagor until possession was taken

by the mortgagee, and thereafter it was deemed the property of the mortgagee. The undivided real estate of deceased persons was to be assessed to the heirs, devisees, or legatees, without designating any of them by name, and each of them was liable for the whole tax. Partnership property was to be assessed to the firm, and each partner liable for the whole tax. The Statutes have for many years contained special provisions regulating the assessment of "migratory stock," and money or property in litigation in the possession of the clerk or other officer appointed by the Court.

The Political Code, §§ 3608, 3627, classifies corporations and their stock. The same is done by § 3617 in respect to deposits in savings and loan associations. § 3663 provides that water-ditches, wagon and turnpike roads, and telegraph lines, with all their improvements and franchises, shall be listed as real estate and as a whole, without separating the land, franchise, or improvements.

When provisions of the character of those above mentioned have, in many instances been upheld by the courts, and in others remained unchallenged for years and up to the present time, in States having constitutional provisions securing equality and uniformity in matters of taxation, and due process of law, we feel justified in saying that the State has competent power, when tested by the 14th Amendment of the Constitution of the United States, to declare that R.R. property situated as this is shall, for the purpose of assessment, constitute *one class*, and shall be assessed by the State Board; and that the Board shall, in making such assessment, assess the whole property *as a unit* and not divide it into two interests or estates, as between the mortgagor and mortgagee, as a county assessor would do in assessing a mere farm and the mortgage upon the same.

This mode of classification and assessment is upheld by the Supreme Court of California in—

S. F. and N. P. R.R. Co. *v.* State Board, 8 Pacific C. L. J., 1061.

And C. P. R. R. Co. *v.* Same, *Id.*, 1072.

It is apparent that the *result* of the several assessments of the classes of property arranged by either the Constitution or the Code is the same, to wit, the *actual value* of the property. If the defendant's position be sustained by this Court, that the 14th Amendment prohibits the State from providing for the assessment of a particular kind of property as one class and as a unit, where it is operated by one corporation, and without any division as between the corporation and its creditors, and further prohibits the State from providing that the assessment be made by a board specially charged with that duty, while other officials perform a similar duty in regard to other property, then State sovereignty has lost its principal attribute, and the rest are scarcely worth an effort for their preservation.

It was stated by Mr. Stevens and others, while the 14th Amendment was under discussion in Congress, that the principles of the amendment constituted a part of the law of the land, but were applicable to Congress and not to the States, and that it was desirable that they should be extended to the States also.

The Constitution of the United States, Art. 1, Sec. 8, provides that "The Congress shall have power to levy and collect taxes, duties, imposts, and excises, * * * but all duties, imposts, and excises shall be uniform throughout the United States."

As a practical illustration of the operation of that constitutional provision, reference might be made to the U. S.

Revenue law of 1862 and the laws amendatory thereof. It would require a careful scrutiny of them to find *one* tax, duty, impost, or excise that was not levied upon the classification system. If the income tax be an exception, it will be noticed that the dreaded inequality is there found, arising out of the amount exempted from the tax.

The power of the United States in regard to taxation of property subject to their jurisdiction, is of no higher order than that of a State over property within its jurisdiction.

While we do not contend that the fact of the unquestioned existence, for many years, of such laws establishes their validity, we think that fact is very significant and entitled to much weight in this discussion.

THE SYSTEM OF TAXATION IN QUESTION IS VALID, EVEN IF ART. XIV OF THE CONSTITUTION IS APPLICABLE TO STATE TAXATION.

It was not the intent of the amendment to give a new meaning to the term "due process of law;" nor can the words, "the equal protection of the laws," have a broader meaning, when applied to taxation, than have the terms "equal and uniform" or equivalent words in the State Constitutions.

Some portion of our discussion of the matter of the so-called deduction, and of notice of the assessment, is applicable to this point.

We will mention only a few instances in which the terms above referred to are employed in State Constitutions. Others will readily be found by reference to the several Constitutions:

California.—Constitution of 1849:

"Taxation shall be equal and uniform throughout the State."

Illinois.—Constitution of 1848:

"A tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property."

Indiana.—Constitution of 1851:

"Provide by law for a uniform and equal rate of assessment and taxation."

Arkansas.—Constitution of 1864:

"Making the same equal and uniform throughout the State."

Kansas.—Constitution of 1855:

"Provide by law for a uniform and equal rate of assessment and taxation."

Massachusetts:

"The Legislature shall only impose proportional and reasonable taxes."

Missouri:

"Taxation shall be uniform and shall be levied on property in proportion to its value."

In the States above mentioned, as well as in most of the other States, the revenue laws have contained provisions which not only established different modes for the assessment of several classes of property, but some of them have fixed different rates therefor. Some out of the multitude will be mentioned.

The assessments have been made by single officers, or by boards, or by both acting successively. There never was any basis for the claim that all the property should be assessed by the same class of officers or boards. The practice has been to the contrary from the first. In California, there

were county assessors, district assessors, and township assessors acting in different counties for the same years. In Indiana an assessor was appointed who assessed the lands once in five years; and county assessors were elected annually who assessed all other property, and improvements upon lands. In Ohio, all corporations except banks return the value of their property to the county auditors. Banks incorporated are listed in a different manner from those that are unincorporated. Railroad property is listed by Boards of Auditors. Express and telegraph companies are listed on the basis of gross receipts. In Massachusetts the returns of certain moneyed corporations are made to, and the listing is made by, the Auditor of State. In Indiana, Illinois, Kansas, Missouri, and other States, railroad property is listed by boards organized for that purpose. And all of those different modes of assessment have invariably been upheld, while the main portion of the property within the respective States has been assessed by single persons, elected or appointed as assessors for the counties or some subdivision thereof.

All these varied modes have been upheld, though the State constitutions have contained provisions similar in their import to the provision in question of the Constitution of the United States.

VII.

Corporations do not come within the Meaning of the Terms of the 14th Amendment.

The Fourteenth Amendment, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the law, has no relation to or operation upon corporations created by or under the laws of the State.

The State may create corporations in such form as she

pleases; may confer, withhold, and impose powers, limitations, and disabilities at her pleasure—powers and disabilities which private persons do not possess, and are not subjected to. Can such powers be conferred or such disabilities be imposed, if the Fourteenth Amendment is operative upon these artificial creatures of the State? The constitutional principle of "equality before the law" does not tie the hands of the State in creating or governing corporations.

The State has granted to these corporations the right to exercise the power of eminent domain; the right to cross its navigable waters; the right to construct its road over the lands of the State; the right to make and enforce rules for the regulation and management of its business; but the State has denied all these to individuals.

Corporations created for the purpose of conducting a particular business may be subjected to a special tax, while individuals conducting the same business are not subject to the tax—such, for instance, as insurance companies in Massachusetts and savings banks in Connecticut.

The rights and liabilities of a corporation are not the mere sum of the rights and liabilities of the individuals constituting the corporation.

Rights and powers are exercised over things commonly denominated property which are not exercised by individuals. The principal difference between corporations and individuals in that regard, relates to the manner in which property may be used.

The State may tax the franchises of its corporations in any manner and to any extent it chooses. It may measure the amount by a per centage on the value of its property, real or personal, or both; or on the gross or the net income. They are all virtually franchise taxes.

Society for Savings v. *Coit*, Conn.

Provident Institution v. *Massachusetts*, 6 Wall.

If these principals are incorrect the revenue system of almost every State is wrong. We cite:

State of Maine v. *The Maine C. R.R.*, 72 Me., 376, in which it was held that a tax of one per cent. imposed upon such corporations, measured by the value of the property acquired by the exercise of their corporate powers, was a franchise tax and was constitutional, although their constitution required that all property should be assessed according to its value, which the Court construed to mean property held by a *natural right.*

Upon this proposition we refer also to

State Railroad Tax Cases, 92 U. S.

While conceding that in one sense corporations are persons, we do not admit that they are persons for all the purposes contemplated by the fourteenth amendment. A corporation cannot enter or do business in a State except with its consent; it cannot make a will, nor can it marry or vote, or hold office. See

The Insurance Co. v. *New Orleans*, 1 Wood, 85.

Central Pacific v. *State Board*, 60 Cal., 35.

The terms "persons" and "citizens," as employed in the 14th Amendment of the Constitution of the United States, do not include corporations.

The Insurance Co. v. *City of New Orleans*, 1 Wood, 85.

That amendment was intended for the protection of the freedmen.

Shauber v. *West Virginia*, 100 U. S., 303.

Virginia v. *Reeves*, 100 U. S., 313.

Missouri v. *Lewis*, 101 U. S., 29.

In the last case it is said that that amendment contemplated *persons* and classes of *persons.*

Corporations do not come within the meaning of Art. 4, Sec. 2—that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

Paul v. *Virginia*, 8 Wall., 177.

Warren Mfg. Co. v. *Ætna Ins. Co.*, 2 Paine, 501.

While conceding that corporations cannot be divested of their *property* by State legislation, it is insisted that they are simply such entities as the State has made, and that an essential part of their being is the reserved power to alter from time to time or repeal the law of their being, can it be held that the Constitution intended that such beings, after being endowed with certain rights and privileges not pertaining to natural persons, should have secured to them all the rights, privileges, and immunities pertaining to natural persons? That would itself produce the discrimination against *natural* persons of which complaint is here made on behalf of corporations. Can it be held that the State has not competent authority to limit the power of corporations in the acquisition or holding of property, both as to the amount and character of the property, while the capacity of natural persons in those respects is unlimited? What ground of objection can be found to legislation, in the original act of incorporation, or in an amendatory act, saying that the property of corporations shall be assessed to the President, or the Directors, or the stockholders; that it shall be assessed in parcels or shall be assessed as a unit; that it shall be assessed by the County Assessor or by the Governor or Controller of State; or by a State Board; or that some shall be assessed in the county where all their property is found, and that another class, differently situated as to property or the like, shall be assessed at the State Capitol?

The relation that the State bears to corporations of its creation, and the power reserved by the State to amend or repeal their charters, the fact that to them are granted powers, and on them are imposed limitations, which natural persons do not enjoy, or to which they are not subject, renders it virtually impossible to give a just application of the principles of the 14th Amendment to them and to natural persons at the same time.

VIII.

IT IS NOT A QUESTION ARISING UNDER 14TH AMENDMENT TO THE CONSTITUTION, WHETHER PARTICULAR PROPERTY IS LISTED IN THE CORRECT NAME,—NOR IS THE QUESTION MATERIAL.

It is not material, in considering the validity of a revenue system, to inquire to whom any property or class of property is required by that system to be assessed; that is to say, against whose name it should be entered on the tax list. The revenue law might provide that all property should be assessed to unknown owners, or that it should be entered upon the list without appending the name of any person. That mode might make it inconvenient to the taxpayer, because of the difficulty in finding his property on the list; but he could not affirm that he was thereby deprived of any constitutional right or protection. In this State it has always been the rule that the owner of real estate must see to the payment of the tax imposed upon it, without regard to the name of the person to whom it was assessed.

It is said in—

State Freight Tax, 15 Wall., 272,

that the question is, what was the subject of the tax—upon what did the burden of the tax rest—not the question from whom the State exacted payment.

This is also illustrated by the large number of cases, which will readily be found, some of which are above cited, in which the taxes on dividends, stock, gross profits, net profits, etc., are required to be paid by the corporations, though the taxes are really taxes upon the stockholders, and in which taxes on property are required to be paid by trustees, guardians, administrators.

Property is listed to trustees, receivers, guardians, executors, and administrators.

Community property—the property of husband and wife—may be listed to the husband, and so may the wife's property.

As we have said, the tax would be valid if the property was listed to unknown owners, or if listed to no one, the property only being described in the list, unless the statute expressly prescribed some particular form in that regard. Considered from a constitutional stand-point, the only inquiry is, whether the property has been subjected to duplicate taxation, or an excessive valuation.

IX.

The Judgment to be rendered in this case for the Tax is not a Personal Judgment.

It is urged by the defendant that it will be subjected to a personal judgment, and, therefore, be obliged to pay that which ought to be paid by the holder of its mortgage. To this position there are several answers. Section 4, Art. 13, provides that both the taxes upon the mortgage interest and the taxes upon the property shall be a lien upon both interests; that is to say, upon the entire property. The Constitution does not prescribe the form or character of the judgment to be rendered in the enforcement of the lien. While it may be true that when a statute creates a

lien, and provides that in its enforcement a personal judgment may be rendered, such judgment would be proper; it is not true that when a lien alone is created that it may be enforced by a personal judgment.

The Constitution, in the same section, after providing that the taxes on both interests are a lien upon the entire property, provides that the taxes may be paid by either, and that the one paying has full recourse against the other.

But this lien does not entitle the plaintiff to a personal judgment, but only to a judgment enforcing the lien; and as conclusive authority upon this point we cite

Taylor v. *Palmer*, 31 Cal., 240,

in which the claim to a personal judgment in the enforcement of a lien for an assessment was denied by the Court, though the statute attempted to confer the right to a personal judgment.

X.

Is the Defendant entitled to Exemption from Taxation on the alleged ground that it is a Federal means or Instrument?

The defendant is not a Federal instrument, or means, created by Congress for the purpose of carrying into execution its powers, within the meaning of the doctrine laid down in

McCulloch v. *Maryland*, 4 Wheat., 316.

It is a California corporation, and not exempted from taxation.

Thompson v. *Pacific R.R.*, 9 Wall., 586-9.
National B'k v. *Commonwealth*, 9 Wall., 363.
Huntington v. *C. P. R.R. Co.*, 2 Sawyer, 503.
R.R. Co. v. *Penniston*, 18 Wall., 34-7.

It is said in

National Bank v. *Commonwealth*, *supra*,

that it is only when the State Law, levying a tax incapacitates the banks from discharging their duties, that it becomes unconstitutional.

A franchise is regarded as property by the Constitution of California. (Art. 13, Secs. 1, 10.)

The franchise in this case, emanating from the State, is subject to State taxation.

The tax in this case no more interferes with the operation of the railroad than would a tax laid upon a coach and team used for the transportation of the mails under a contract with the Government.

XI.

The Franchise of the Defendant is subject to Taxation.

The corporation was organized and exists under and by virtue of the laws of California.

The Atlantic and Pacific Railroad Act (14 U. S. Stat., p. 292, sec. 18) provides "that the Southern Pacific Railroad, a company incorporated under the laws of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad formed under this act," etc., and thereby recognizes it as an existing California corporation.

The Texas Pacific Railroad Act (16 U. S. Stats., sec. 23) provides "that, for the purpose of connecting the Texas Pacific Railroad with the City of San Francisco, the Southern Pacific Railroad of California is hereby authorized (subject to the laws of California) to construct a line of railroad from * * * to the Texas Pacific Railroad," etc.,—again recognizing this corporation as formed under the laws of California.

All its corporate franchises, rights, powers, and privileges emanate from the laws of the State providing for the formation of railroad companies.

The State authorized it to construct and maintain a railroad, and therefor to acquire the right of way, to acquire and hold the necessary property, to collect freights and fares, and do all those things which were necessary in the construction, maintenance, and operation of its railroad.

The grant of land in aid of its construction, and of the right of way over the public land, and of the right to connect with the railroads above named, are not grants of franchises. Had the same grants been made to a private individual, no one would have claimed that the grants constituted franchises.

There is no better ground for asserting that such grants converted this corporation into a Federal Corporation than there would be to claim that grants of a like character, if made by the State to the other corporations created by those acts, would convert them into State Corporations.

If the positions contended for by the defendant be maintainable, it is difficult to see why Congress might not grant some aid or right to all turnpike companies, stage companies, transportation companies, express companies, telegraph companies, manufacturing companies, mercantile companies, agricultural companies, etc., upon the condition that they should perform services, or furnish supplies to the United States, at the same rates as to private persons, but giving the United States the priority, and thus withdraw a large part of the property of the State beyond the reach of State taxation.

The franchise of the defendant was granted by the State, and as such it is subject to taxation by the State.

It was authorized by law to assess the franchise derived from the State—the Constitution so provides—and that

allegation will be read as meaning that franchise; and if it can be held that the above mentioned acts of Congress also granted franchises to the defendant, and that they are not subject to State taxation, the assessment will be regarded as an assessment of the franchise emanating from the State. The familiar rule, that the Board will be presumed to have performed its duty, will raise the presumption that it was the State franchise which was the subject of the assessment.

XII.

If the Defendant's Position be Sustained, either the Attempted so-called Deduction of the Value of Mortgages is Illegal and Void, or the whole Revenue System of the State, and those of many other States, are Unconstitutional and Void.

If the defendant's position be sustained, to the effect that the "equal protection of the laws" applies to methods of State taxation, and that the defendant is denied the equal protection of the laws, by the refusal on the part of the State to permit such corporation to have its property divided into two classes for the purpose of assessment, as is done in case of other property than that of *quasi* public corporations—or stated as the defendant states the position, by the refusal by the State to deduct the value of the mortgage upon its property from the value of its property for the purpose of assessment—does it follow that for that reason the assessment of the defendant's property is void? This division—this deduction—*cannot possibly* be made under the Constitution, or any law passed or to be passed in pursuance of its provisions. Such division or deduction is *forbidden* by the Constitution, and if there must be this uniformity, this "equal protection of the laws" in

this respect, it results by inevitable necessity, that the attempted division or deduction in cases of mortgage, etc., upon property *not* of *quasi* public corporations, must fail—must be declared to be null and void. This might be illustrated by the exemption of growing crops from taxation. Should other property-owners satisfy this Court that such exemption produced an inequality, that it denied to others the "equal protection of the laws," as this Court could not provide a similar exemption for others, the exemption of growing crops must necessarily fail. In such case the Court would be compelled to hold that the attempted exemption of growing crops would be unequal and illegal, and therefore could not be made.

If this division or deduction attempted to be granted to other than *quasi* public corporations, does not necessarily fail, then a result bringing great confusion and disaster to the State must ensue. No taxation of this defendant, or of other *quasi* public corporations holding property subject to mortgage being posssible, under the State Constitution, when tested by the clause securing the "equal protection of the laws," if the defendant's position be sustained, all other property-owners in the State can successfully appeal to the same clause for protection. The tax on their property is necessarily increased by the exemption of the property of *quasi* public corporations. If the refusal to permit such corporations to deduct the value of mortgages from the value of their property is a denial of the equal protection of the laws, it is manifest that a system of taxation which permits the exemption of all the property of such corporations from taxation, must be a denial to all other property-holders of the equal protection of the law. The refusal to exempt the property of all others, while that of such corporation was exempted, would be a far more flagrant breach of the constitutional

provision, than is the refusal to permit such corporation to deduct a portion of their property—that represented by the mortgage—so that it will in effect be exempt from assessment and taxation to them.

If the defendant's position be sustainable, then the entire revenue system, so far as it depends upon taxation upon property, is illegal and void, and the same result must ensue in many other States.

XIII.

The Mortgage of the property of the Railroad Company.

The defendant's mortgage contains this covenant: "The said party of the first part (the R.R. Co.) hereby agrees and covenants to and with the said parties of the second part and their successors in said trust, that it will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which shall or may be imposed upon the property herein described and hereby mortgaged, and every part thereof; and the parties of the second part * * * may, in case of default of said party of the first part in this behalf, pay and discharge the same, * * * and for all such payments thus made, the party so making the same shall be allowed interest thereon * * * and such payments, with the interest thereon, shall be and are hereby secured to them by these presents, * * * and the same shall be payable by the said party of the first part to the said parties of the second part * * * and may be paid out of the proceeds of the sale of said property and franchise hereinbefore described."

The mortgage was executed April 1st, 1875—long prior to the adoption of the present Constitution of the State. (Record, p. 18.)

The question of the liabilities of the respective parties to a mortgage, executed before the adoption of the present Constitution,—the mortgage containing a covenant similar to the one above recited, for the payment of the taxes upon the whole property affected by the mortgage—was presented to and passed upon by the Supreme Court of the State in

Beckman v. Skaggs, 59 Cal., 541,

and the Court held, that by reason of the above-mentioned covenant the mortgagor was bound to pay the taxes upon the whole property, and that the provisions of the Constitution requiring the interest of the mortgagee in the mortgaged premises to be assessed did not have the effect to abrogate or impair a covenant which was in force at the adoption of the new Constitution.

The construction thus given by that Court to that clause of the Constitution, as operative upon mortgages of that character, will, without doubt, be regarded as binding upon this Court.

In view of this covenant and its effect upon the constitutional provision in question, we ask, of what interest is it to the defendant whether the railroad property be divided in its assessment between mortgagor and mortgagee or whether it be all assessed to the mortgagor? Whether the property be assessed to the holder of one interest or the holders of the several interests, the defendant must pay the entire taxes.

Relying upon the doctrine announced in

Stanley v. *Supervisors*, 105 U. S.,

and other cases in this Court, we say that it is not enough for the defendant to show that if its property were subject to other contracts than it is; that if its mortgage had been executed after the adoption of the Constitution, and contained no such covenant as the one above recited, the defendant *might be* injured by an assessment made in disregard of the mortgage. This Court sits to redress

real—not imaginary—injuries. Had the defendant given no mortgage, this Court would not listen to a statement of the grievances to which it would have been subjected had it given a mortgage, nor to grievances which it might have suffered, had its mortgage been free from that significant covenant.

XIV.

The Agricultural Lands of Defendant.

Complaint is made that the defendants are subjected to an unjust discrimination, because their agricultural lands have not the benefit of the so-called deduction—cannot have their valuation divided as between the mortgagor or mortgagee. As they are held by the defendants in their corporate capacity there is no just ground of complaint. The State may alter or amend the laws relating to corporations at will.

But these cases do not involve taxes upon agricultural land. Only lands included in the right of way are involved in these cases.

State Freight Tax, 15 Wall., 232.
Stanly v. *Supervisors*, 105 U. S., 305.
Austin v. *Aldermen*, 7 Wall., 694.

When a case involving the taxation of the lands of the railroad company shall be presented to this Court, we trust that the State will be represented here by counsel fully prepared to defend her revenue system in that regard.

STATE QUESTIONS.

In deciding these cases the Circuit Court gave no attention to the questions which are denominated *State questions*, as contra-distinguished from the important questions in this litigation, the Federal questions. And when the first one of this class of cases was being prepared for trial in the Circuit Court, counsel for the respective parties framed

the pleadings in one case—*the San Mateo case*—as a test case, so that all the Federal questions and only those questions might be determined by that court and afterwards by this Court. The argument of that case, both in the Circuit Court and this Court, was confined to those questions, and that, too, with manifest propriety.

But when the Santa Clara group of cases was presented to the Circuit Court the defendants presented several State questions, and it may be assumed that they will be reviewed here. Many of them are of such a shadowy and attenuated character that they may be denominated, as they were by one of the counsel in the Circuit Court, as microscopic questions.

a. One of those points was that the apportionment of the assessment of the railroad property among the several townships and other territorial sub-divisions of the county was illegal, because made by the Board of Supervisors of the county, instead of the State Board of Equalization.

The Constitution, Art. XIII., Sec. 10, does not expressly provide that such apportionment shall be made by the State Board. But the Political Code, § 3665, provides that the State Board must apportion the valuation among the counties, and cities and counties, and that the County Board must apportion the same within the county; that is to say, must declare the length of the main track of the railway, as apportioned by the State Board, lying in each city, township, etc., in the county. The County Board must, by measurement, ascertain what portion of the main track, apportioned to the county, lies in each city, township, etc., of the county; and then, by a simple problem in proportion, ascertain what amount of the valuation apportioned to the county belongs to such city, township, etc., in the county. An error in measurement or computation can readily be corrected on application to the County Board.

No error in that regard is averred in the answer.

It does not appear in the Santa Clara case that any taxes are sued for, except State and county taxes; and we think the same is true in the other cases; and therefore the subdivision among the subdivisions of the county is immaterial.

b. It is contended by the defendants that the whole assessment is erroneous because the franchise was not separately assessed.

The law does not require the franchise of a railroad, which is assessed by the State Board, to be separately assessed. But if it be considered that the law does so require, we answer that the details of the assessment are not found in this case—the assessment is not in the findings—and it will be presumed that the franchise as well as all the items going to make up the railroad were *duly assessed.*

Under the operation of the statutory rule laid down in §§ 3789 and 3900, the copies of the assessment and of the delinquent list, set out in the findings, make a *prima facie* case in all respects; and defendants have not overthrown it.

c. That the ties, rails, etc., were not assessed as improvements on real estate.

The "roadway, road-bed, and rails" were assessed; and the point of the objection seems to be that after having been assessed, the ties, rails, etc., were not denominated "improvements on real estate." As the valuation, the rate of the tax, the amount of tax, and the time and manner of payment are the same, whatsoever *name* may be given to the property when assessed, it is difficult to appreciate the point of the objection.

d. The roadway is not described as farms are—that is, by subdivisions of quarter sections, or by the courses and distances of the side lines.

The law does not require such an absurd description.

The law does not require railroads to be described in the same manner as farms.

It would be difficult to give a description which would be more accurate than the "road-bed from San Francisco to San José."

The assessment of the railroad, as made by the State Board, is not contained in the findings. How can the defendant say in this Court that the form of the assessment is illegal in any respect?

e. The cars are not described so that they may be identified.

But we repeat; the assessment is not in the Record. The defendant cannot say that in matter of description it is illegal or insufficient.

f. The Assessor entered in the Assessment Book the entire letter directed to him by the State Board communicating the apportionment of the railroad to the county—that is, the whole valuation, the length of the entire main track, the length of same in the county and its description, and the assessed value per mile.

If the defendants have been misled, or in any manner injured by the insertion in the assessment book of the *address* of the letter and the names of the members of the Board who wrote it, they have failed to specify in what respect.

g. The State Board assessed in one instance two miles of water, and in another one mile of water, as so many miles of the road.

The State Board, in those respects, followed the statements presented to the State Board by the respective companies. If the railroad companies misled the Board, they cannot complain of their own wrong.

h. The State Board, in making the assessment, included the value of the fences erected on the lines of the roadway.

The amount at which the fences were valued is $300 per mile. If the inclusion of the value of the fences was improper, it can readily be deducted from the total valuation apportioned to the county.

It is presumed that the Board performed its duty in this respect, and ascertained that the fences were the property of the railroad company and *pertained to the right of way*. It is not found to the contrary in either of the cases in which the fence appears.

i. It is objected that those causes, in which "The People of the State" are plaintiffs, cannot be maintained.

The Act of April 23d, 1880, (see Pol. Code, p. 761,) which provides that the action may be brought in the name of the county does not purport to repeal § 3900 of the Pol. Code, which provides for the bringing of the action in the name of "The People of the State of California." The latter Act is not inconsistent with the former.

The objection can be taken only by demurrer or answer. See Code of Civil Procedure, §§ 430–434.

The objection is the want of capacity to sue, and if not taken by demurrer or answer it is waived.

We contend that upon the findings of fact judgment should be ordered to be entered for the plaintiff for the State taxes, the county taxes, the penalty of five per cent. for the delinquency, the interest on the amount of both of those taxes, (see Political Code, § 3803,) for the attorney's fees at the rate of ten per cent. upon the recovery, (see Pol. Code, § 3900,) and for costs of suit.

Respectfully submitted.

D. M. DELMAS AND
A. L. RHODES,
Attorneys for Plaintiffs in Error.

The amount at which the fences were valued is $300 per mile. If the inclusion of the value of the fences was improper, it can readily be deducted from the total valuation apportioned to the county.

It is presumed that the Board performed its duty in this respect, and ascertained that the fences were the property of the railroad company and *pertained to the right of way*. It is not found to the contrary in either of the cases in which the fence appears.

i. It is objected that those causes, in which "The People of the State" are plaintiffs, cannot be maintained.

The Act of April 23d, 1880, (see Pol. Code, p. 761,) which provides that the action may be brought in the name of the county does not purport to repeal § 3900 of the Pol. Code, which provides for the bringing of the action in the name of "The People of the State of California." The latter Act is not inconsistent with the former.

The objection can be taken only by demurrer or answer. See Code of Civil Procedure, §§ 430–434.

The objection is the want of capacity to sue, and if not taken by demurrer or answer it is waived.

We contend that upon the findings of fact judgment should be ordered to be entered for the plaintiff for the State taxes, the county taxes, the penalty of five per cent. for the delinquency, the interest on the amount of both of those taxes, (see Political Code, § 3803,) for the attorney's fees at the rate of ten per cent. upon the recovery, (see Pol. Code, § 3900,) and for costs of suit.

Respectfully submitted.

D. M. DELMAS AND
A. L. RHODES,
Attorneys for Plaintiffs in Error.

118-394-417

Supreme Court U. S.
FILED.
JAN 16 1886
JAMES H. McKENNEY.
CLERK.

CALIFORNIA RAILROAD TAX CASES.

In the Supreme Court

OF THE

UNITED STATES.

THE COUNTY OF SANTA CLARA, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 464.
THE COUNTY OF SAN BERNARDINO, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 619.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE NORTHERN RAILWAY COMPANY.	No. 620.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 621.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 622.

Brief for Defendants,

BY

S. W. SANDERSON.

WASHINGTON:
JUDD & DETWEILER, Printers.
1886.

CALIFORNIA RAILROAD TAX CASES.

Supreme Court of the United States.

THE COUNTY OF SANTA CLARA, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 464.
THE COUNTY OF SAN BERNARDINO, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 619.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE NORTHERN RAILWAY COMPANY.	No. 620.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 621.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 622.

Brief for Defendants,

BY

S. W. SANDERSON.

WASHINGTON:
JUDD & DETWEILER, Printers.
1886.

INDEX.

	PAGE
Wherein the cases differ	2
Assessments not proven	4
Fences illegally included in assessments	5
Taxes in suit do not draw interest	6
Franchises are Federal and therefore not taxable	6
Act of California granting right of way to U. S.	7
Act of California assenting to Act of Congress	7
Atlantic and Pacific Act of Congress	8
Union and Central Act of Congress	10
Answer to Rhodes' points that they are State franchises	13
Franchises unaffected by consolidation	15
Corporations are persons within 14th Amendment	28
Act amending Section 3664 P. C. not law	29
Constitution of California violates equality clause of 14th Amendment	29
System not classification	30
System not due process of law	35
System not an exercise of power to amend, &c	35
Taxes unaffected by covenant in mortgages	35

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE COUNTY OF SANTA CLARA, Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 464.

THE COUNTY OF SAN BERNARDINO, Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 619.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,
vs.
THE NORTHERN RAILWAY COMPANY. } No. 620.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 621.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 622.

BRIEF ON BEHALF OF DEFENDANTS.

Before the application to advance these cases I had written and printed my brief in the San Bernardino case (*No.* 619).

This had been done pursuant to a stipulation with the attorney general of California to the effect that the San Bernardino case should be submitted on printed arguments under the ninety-day rule. To that brief I refer for a statement of the constitution and laws of California involved in the discussion and decision of these cases, and also for an argument on most of the points in controversy. There are, however, some points not discussed in the San Bernardino brief which will be briefly noticed in this. The question as to whether the franchise of the Central Pacific Railroad Company (No. 621) is a Federal franchise, and, therefore, not subject to State taxation, is discussed in the appendix to my San Bernardino brief, to which I also refer the Court; but the question as to whether the franchises of these corporations are Federal or not, and whether, if they are Federal, they are subject to State taxation or not, will be somewhat further discussed in this brief.

The are some points of difference between these cases to which the attention of the Court should be called:

First. The question as to the constitutionality of the pretended act of the Legislature of California of 1881, purporting to amend section 3664 of the Political Code of that State, is not a question in the San Bernardino case (No. 619), although the history of the bill is set out in the findings, for the reason that the assessment sued on in that case was made on the 30th day of April, 1880 (*Record*, p. 70), while the last action on the amendatory bill in question was had nearly a year afterwards, on the 4th of March, 1881. (*Record*, p. 76.) Nevertheless, as before stated, the history of the bill was set out in the findings (at the request of the Attorney General, as I am advised), and from that fact I naturally as-

sumed that its validity was a question in the case, and accordingly I discussed the constitutionality of the bill in my brief. The bill is printed in that brief, commencing at the bottom of page 11, and its validity is discussed at page 83. Whether this amendatory bill affords notice or an opportunity to be heard is discussed at page 119. These designated portions of my brief in the San Bernardino case are, therefore, to be disregarded in the decision of that case, but they are in point in all the other cases.

Second. The evidence offered in proof of the assessments of the State Board of Equalization is not the same in all the cases.

In *No.* 464, both the original and ~~duplicate~~ delinquent assessment books of the county were introduced in evidence. (*Record, pp.* 60, 65.) In all the other cases only the original assessment books of the counties were introduced in evidence. (*No.* 619, *p.* 70; *No.* 620, *p.* 33; *No.* 621, *p.* 47; *No.* 622, *p.* 57.) In none of the cases were the books of the State Board of Equalization, or certified copies thereof, produced in evidence for the purpose of proving any of these assessments.

Third. Nos. 464 and 619 are brought in the names of the counties under the provisions of the act of 1880 (*San Bernardino Brief, p.* 5), which provides that "the *duplicate* assessment roll * * * shall be *prima facie* evidence of the plaintiff's right to recover." As already stated, neither the duplicate assessment rolls nor copies thereof were introduced in evidence.

Nos. 620, 621, and 622 were brought in the name of the people of the State of California under the provisions of sections 3899 and 3900 of the Political Code (*San Bernardino Brief, pp.* 3, 4), which provide that the entries in the *delin-*

quent list certified by the tax collector and delivered to the controller shall be *prima facie* evidence of the right of the *people* to recover. As already shown, this *prima facie* evidence in proof of the assessments was not introduced in any of these latter cases. It was introduced in the Santa Clara case (*No.* 464, *p.* 65), but in that case it was not competent, because the act under which the action was brought makes the *duplicate assessment roll prima facie* evidence. (*San Bernardino Brief, p.* 5, *Section* 1.)

Fourth. All the taxes in the San Bernardino case (No. 619) have been paid, leaving in controversy only the five per cent. penalty for non-payment, ten per cent. attorneys' fees, and interest at two per cent. per month. This was done so that in any event a decision might be obtained upon the right of the plaintiff to recover them or either of them. In the other cases the taxes, so far as the records show, have not been paid.

Fifth. In the case against the Northern Railway Company (*No.* 620) the question whether a Federal franchise is subject to State taxation is not involved. That company is a mere State corporation, and possesses no Federal franchises. This question, however, is involved in all the other cases. All other points in argument are common to all these cases.

I.

None of these Assessments were Proved by Legal Evidence.

In continuation of what I have said upon this point in my San Bernardino brief (p. 28) I add as follows:

I have shown in the foregoing statement of the points of difference in these cases that in neither of them was the

evidence prescribed in the statutes under which they were brought produced in proof of the assessments. These statutes depart from the rule of the common law, which requires the production of the best evidence, and allows other evidence, not the best, to be produced. In these cases, under the common law, the assessment books, or certified copies thereof, of the State Board of Equalization should have been produced. No departure from this rule can be allowed, unless authorized by some statute applicable to the case, and where such is the case the precise evidence prescribed in such statute must be produced. Of this there can be no question. In these cases neither the evidence required by the common law nor the evidence required by the statutes applicable to the cases was produced. It results that none of these assessments were proved.

II.

As to whether Fences between the Roadway and Adjoining Land were Legally Included in these Assessments.

This question is involved in all the cases (*No.* 464, *p.* 74, subd. XXIX; *No.* 619, *p.* 78, subd. XXVIII; *No.* 620, *p.* 41, subd. XVI; *No.* 621, *p.* 63, subd. XXX; *No.* 622, *p.* 65, subd. XXVIII).

To what I have said upon this point in my brief in the San Bernardino case (*No.* 619), at page 31, I have nothing to add.

III.

As to whether the Taxes in Suit Draw Interest from Date of Delinquency.

This question is directly involved in the San Bernardino case (*No.* 619), whether the judgment in other respects be affirmed or reversed. It is also involved in all the other cases, if, for any cause, the judgment should be reversed.

Upon this question I refer the Court to what has been ~~better~~ said in my brief in the San Bernardino case (*No.* 619) at page 36, to which I have nothing to add.

IV.

As to whether the Franchises to Construct and Operate the Roads which are Provided for in the Acts of Congress are Federal, and, as such, not Subject to State Taxation.

This question, in respect to the Southern Pacific railroad from San Francisco to the Needles, and from Tehachapa Pass (a point on the above line) to Fort Yuma, is discussed in my brief in the San Bernardino case (*No.* 619), at page 40; and and in respect to the Central Pacific railroad, constructed under the Pacific Railroad act of Congress of July 1st, 1862 (12 U. S. Stat., 489), the question is discussed by Mr. Haymond (of counsel in these cases in the court below) in the appendix to my brief at page 165, to all of which the Court is referred

The acts of Congress in respect to both of these roads. were assented to by the State of California—in respect to the Southern Pacific, by an act which is printed in the San Bernardino brief at the foot of page 24. The acts in respect to the Central Pacific, of which there are two, are not printed in that brief. They are as follows :

"*An act to grant the right of way to the United States for railroad purposes.*

"Whereas the interests of this State, *as well as the whole Union,* require the immediate action of the Government of the United States for the construction of a *national thoroughfare* connecting the navigable waters of the Atlantic and Pacific Oceans, for the purposes of *national safety,* in the event of war, and *to promote the highest commercial interests of the Republic:*

"*The people of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. The right of way through this State is hereby granted to the United States for the purpose of constructing a railroad from the Atlantic to the Pacific Ocean."

Statutes 1852, p. 150.

On the 4th day of April, 1864, the Legislature passed the following act:

"An act to aid in carring out the provisions of the Pacific Railroad and Telegraph Act of Congress and other matters relating thereto.

"*The people of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. Whereas by the provisions of an act of Congress entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1st, 1862, the Central Pacific Railroad Company of California is authorized to construct a railroad and telegraph in the State of California, and in the Territories lying east of said State towards the Missouri river: Therefore, *to enable said company more fully and completely to comply* with and *perform the provisions and conditions* of said act of Congress, the said company, their successors and assigns, are hereby authorized and empowered, and the right, power and privilege is hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate the said railroad and telegraph line, not only in the State of California, but also in the said Territories lying east of and between said State and the Missouri river, with such branches and extensions of said railroad and

telegraph line, or either of them, as said company may deem necessary or proper, and also the right of way for said railroad and telegraph line over any lands belonging to this State, and on, over, and along any streets, roads, highways, rivers, streams, water, and water courses, but the same to be so constructed as not to obstruct or destroy the passage or navigation of the same, and also the right to condemn and appropriate to the use of said company such private property, rights, privileges, and franchises as may be proper, necessary, or convenient for the purposes of said railroad and telegraph, the compensation therefor to be ascertained and paid under and by special proceedings, as prescribed in the act providing for the incorporation of railroad companies, approved May 20th, 1861, and the act supplementary and amendatory thereof, said company to be subject to all the laws of this State concerning railroad and telegraph lines, except that messages and property of the United States, of this State, and of said company shall have priority of transportation and transmission over said line of railroad and telegraph, *hereby confirming to and vesting in said company all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by said act of Congress, hereby repealing all laws and parts of laws inconsistent or in conflict with* the provisions of this act, or the rights and privileges herein granted.

"SECTION 2. This act shall take effect and be in force from and after its passage."

(Statutes 1863–4, p. 471.)

The provisions of the Atlantic and Pacific act (14 U. S. Stats., 292) and of the Union and Central Pacific act (12 U. S. Stats., 489), upon which the question whether the franchises to build, maintain, and operate these roads are Federal or mere State franchises in part depends, are as follows:

Atlantic and Pacific Act.

"SEC. 8. *And be it further enacted*, That *each and every grant*, right, and privilege herein are so *made and given to and accepted by* said Atlantic and Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within

two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-eight.

"SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, *and allow the same to continue for upwards of one year*, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

"SEC. 11. *And be it further enacted*, That said Atlantic and Pacific railroad, or any part thereof, *shall be a post route and military road subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.*

"SEC. 12. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior.

"SEC. 13. *And be it further enacted*, That the directors of said company shall make and publish an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, a copy of which shall be deposited in the office of said Secretary of the Interior, and they shall, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road or any part thereof.

"SEC. 17. *And be it further enacted*, That the said company is authorized *to accept to its own use* any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the Legislature of any State, or by any corporation, person or persons, or by any Indian tribe or nation through

whose reservation the road herein provided for may pass; and said corporation is authorized *to hold and enjoy any such* grant, donation, loan, power, franchise, aid, or assistance to its own use for the purpose aforesaid: *Provided*, That any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

"SEC. 18. *And be it further enacted*, That the *Southern Pacific railroad, a corporation incorporated under the laws of the State of California*, is hereby authorized to connect with the said Atlantic and Pacific railroad formed under this act, at such point, near the boundary line of the State of California, *as they shall deem most suitable for a railroad line to San Francisco*, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, *shall have similar grants of land, subject to all the conditions and limitations herein provided*, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for.

"SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, *namely*, to *promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights* of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act."

Union and Central Pacific Act.

An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, *and to secure to the Government the use of the same for postal, military, and other purposes.*

"SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government whenever required

to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid. * * *

"SEC. 9. *And be it further enacted,* * * * The Central Pacific Railroad of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions in all respects as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California." * * *

"SEC. 10. *And be it further enacted,* * * * The Central Pacific Railroad Company of California, after completing its road across said State, *is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri river*, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

"SEC. 12. *And be it further enacted,* * * * The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that when completed cars can be run from the Missouri river to the Pacific coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio Railroad; *the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one connected, continuous line.* * * *

"SEC. 16. *And be it further enacted,* That at any time after the passage of this act *all* of the railroad companies named herein and assenting hereto, or any *two* or more of them, are authorized to form themselves into one *consolidated* company; notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act.

"SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, *Congress may pass an act to insure the speedy completion* of said road and branches or put the same in repair and use, and may direct the *income* of said railroad and telegraph line to be thereafter devoted *to the use* of the United States to repay all such expenditures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed, so as to form a continuons line of railroad ready for use from the Missouri river to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the *whole of all of said railroads* before mentioned and to be constructed under the provisions of this act, together with *all their furniture, fixtures, rolling-stock, machine shops, lands, tenements and hereditaments, and property of every kind and character, shall be forfeited and taken possession of by the United States.* * * *

"SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may *reduce* the rates of fare thereon, if unreasonable in amount, and may *fix* and *establish* the same by law. And the better to accomplish the object of this act, namely, *to promote the public interests and welfare* by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.

"SEC. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith, under the provisions of this act, shall make to the Secretary of the Treasury an annual report wherein shall be set forth—

"*First.* The names of the stockholders and their places of residence, so far as the same can be ascertained.

"*Second.* The names and residences of the directors, and all other officers of the company.

"*Third.* The amount of stock subscribed and the amount thereof actually paid in.

"*Fourth.* A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such surveys.

"*Fifth.* The amount received from passengers on the road.

"*Sixth.* The amount received for freight thereon.

"*Seventh.* A statement of the expense of said road and its fixtures.

"*Eighth.* A statement of the indebtedness of said company, setting forth the various kinds thereof, which report shall be sworn to by the president of the said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year."

To what I have said upon this question in my brief in the San Bernardino case I desire to add something more, in answer to certain points made by counsel upon the other side in the court below, which will, doubtless, be also made in this Court.

In the brief filed in the San Bernardino case (*No.* 619) by the attorney general of California Judge Rhodes is represented, at page 42, as having said—

1st. That the Central and Southern Pacific Companies do not possess any Federal franchises.

2d. That, if they do, they also possess State franchises, and the presumption is that the latter only were assessed by the State Board of Equalization.

The first point is answered by the findings in all of these cases. The acts of Congress providing for the construction and maintenance of these roads are found; also the acts of the Legislature of California assenting to the acts of Congress and vesting in these corporations all the rights, etc.,

granted in said acts. The findings then proceed as follows: "As such corporation, and in pursuance of the acts of the Legislature of California and acts of Congress referred to in these findings, said Southern Pacific Railroad Company (or Central Pacific, as the case may be) constructed a line of railroad, and procured the rolling stock, etc." (*No.* 464, p. 45, subd. X; *No.* 619, p. 66, subd. X; *No.* 621, p. 44, subds. III, VIII, IX, X, XII; *No.* 622, p. 54, subd. X.)

Thus it appears from the findings that these roads, or such of them as are mentioned and described in said acts of Congress, were constructed and are now being operated under Federal franchises. The only franchises, if any, possessed by the corporations, derived from the State, are such as are included in corporate being and corporate capacities and faculties, disconnected from the ownership, possession, and enjoyment of these roads and their equipments. We claim that even these became Federal through the joint action of Congress and the Legislature of California. Prior to such joint action the corporate being, capacities, and faculties of these companies were finite, and would have ceased at the end of fifty years; but by such joint action they became immortal, as in the case of the Union Pacific and the Texas Pacific, because such immortality was necessary to fully accomplish the purposes of Congress.

The second point is also answered by the findings in all these cases. Had the State Board intended only to assess the franchises derived from the State, to wit, corporate being, capacities, and faculties, they would not have described or measured them by the *mile*, which they did in every case; they would not have assessed them, as they did in the San Bernardino case (*No.* 619), at $2,000 per mile (*No.* 464, p. 60, last clause but one in the assessment;

No. 619, p. 70; *No.* 620, p. 33; *No.* 621, p. 47; *No.* 622, p. 57). It is evident, from these assessments, that the franchises, which the State Board of Equalization assessed, were the franchises granted by the Federal Government, to wit, the power to construct, maintain, and operate the roads in question.

The records in these cases show that the original corporations—Central and Southern—have been severally consolidated with other corporations whose franchises were all derived from the State. In view of these facts, it is claimed by counsel upon the other side, in effect, that if these corpotions and their franchises, in the first instance, were metamorphosed, by the joint action of Congress and the Legislature of the State, into Federal corporations and franchises, they were remetamorphosed, by the process of consolidation, into State corporations and franchises. But this is clearly untenable. Such consolidations did not change or affect the railroad franchises of either constituent, or the tenure by which they had been previously held.

The new corporation merely stepped into the shoes of its several constituents, and possessed and enjoyed their several railroad franchises, upon the same terms and conditions upon which they had been previously held and enjoyed by its constituents severally. If, in such case, the existence of one constituent is limited to a shorter period of time than the other, the consolidation does not prolong the existence of the former. The same rule obtains in all other respects. If different rates of compensation are allowed to the different constituents, the rates remain severally the same after the consolidation as they were before.

If, then, as we claim, the Federal part of the franchise is not taxable, we have the case of a franchise, taxable in part

and non-taxable in part, taxed as a unit without any data by which the parts can be separated. This renders the whole tax upon the franchise illegal.

I also wish to add something more upon the question whether the franchises of the Southern and Central Pacific corporations are derived from the Federal Government.

The Southern Pacific cases show that Congress created the Atlantic and Pacific Railroad Company, and empowered it to build and maintain a railroad from Springfield, in Missouri, to the Pacific Ocean, and declared that such railroad should be a post and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and should also be subject to such regulations in respect to compensation for such service as Congress might see fit to prescribe.

They also show that Congress prescribed rules and regulations for the construction and use of such road, including the subject of fares, tolls, and charges for the transportation of persons and property. They also show that Congress prescribed the time within which such road should be constructed, and that, in case it should not be constructed within the time prescribed, Congress should have the right to adopt such other measures as they might think necessary to insure its speedy completion.

They also show that the object of Congress in causing said road to be constructed was to promote the public interest and welfare, and to secure to the Government of the United States at all times, but particularly in time of war, the use and benefit of said road for postal, military, and other purposes.

They also show that to insure the accomplishment of such objects Congress reserved the power, having due regard to the rights of said company, to add to, alter, amend, or repeal

the act by which said company was authorized to construct and maintain said road.

They also show that Congress authorized the Southern Pacific company to construct a branch road of the same guage to San Francisco from such point on said main road near the boundary line of California as it might deem most suitable, and that Congress required it to build said branch road for the same purposes and subject to the same conditions and limitations for and subject to which said main road was to be built; that is to say, subject to the same conditions as to Government service, as to the regulation of fares and charges, as to the construction and completion of the road, as to the right of the United States to interfere in case of default and cause the road to be constructed through other agencies and means, and, lastly, as to the right of Congress to add to, alter, amend, or repeal. They also show the same state of facts in relation to the branch road from Tahachapa to Fort Yuma. Thus the powers and franchises, the obligations, forfeitures, and duties of the Southern Pacific Company, in respect to its roads, were made the same as those of the Atlantic and Pacific Company in respect to its road. In relation to their respective roads and to the United States these two companies were placed upon the same level. In respect to their roads, all their rights and privileges came to them from the same donor, and all their obligations and duties were imposed by, and were made due to, the same sovereign.

This course on the part of Congress constitututed the Southern Pacific Company a national corporation; or, in other words, endowed it with a dual corporate existence, which would enable it to survive a repeal by the State of California of the statute under which it was originally

formed, and under which it exists in its capacity of a State corporation.

Where there are no constitutional restrictions upon the mode in which corporations may be created—as in the case of Congress—no magic words, no set or formal phrase is required, nor is it necessary there should be an express declaration of an intent to create. A corporation may be created by implication. An instance of a corporation so created is given in Dyer, 100. It is thus stated:

"As if the Crown should grant lands to 'The Men of Islington,' without saying to them and their successors, this was held to incorporate them forever for that purpose, for without such incorporation the grant would fail, and the continuous identity of the grantees is sufficient to build an implication upon."

"No precise form of words is necessary in the creation of a corporation. If the words 'found,' 'erect,' 'establish,' or 'incorporate' are wanting, it is immaterial, for the assent of the Government may be given constructively or presumptively without such words. * * * It is a principle of law which has often been acted upon that where rights, privileges, and powers are granted to an association of persons by a collective name, and there is no mode by which such rights can be enjoyed or such powers exercised without acting in a corporate capacity, the association is made a corporation by implication, so far as to enable it to exercise the rights and powers granted."

Angell & Ames on Cor., secs. 76, 78.

This rule has been applied to the case of a bank, the incorporation of which was in dispute. The act of incorporation did not declare that the bank should be a body politic and corporate, but it conferred powers which could not well be exercised except by a corporation. The Court said:

"No particular form of words or mode of expression is necessary to create a corporation. All the authorities show

that a corporation may be established by necessary implication as well as by an express grant."

Mahoney vs. The Bank of the State, 4 Ark., 620.

It may be said that a corporation cannot exist under two distinct sovereignties at the same time. But if such be the fact—a fact which I do not admit, however—there is nothing in law or reason why one sovereign may not adopt a corporation which has been created by another sovereign, and by such adoption make it a corporation in respect to itself, or himself, and as such entitled to the same rights and the same protection which it would have enjoyed had it been originally created by such sovereign. Such adoption need not necessarily destroy or sever the relation which existed between such corporation and the sovereign by which it was created. It may only bestow upon it a dual existence or relation such as exists in the case of natural persons born in the United States, or naturalized under the laws of the United States. They are citizens of the United States, and also citizens of the State in which they live. They exist, at the same time, under two distinct sovereignties, to each of which they owe allegiance, and to each of which they have a right to look for protection in the enjoyment of life, liberty, and property.

An instance of this dual existence is found in the records of this court. A corporation was formed or incorporated under the laws of Indiana to construct a railroad having its termini within that State. Afterwards the State of Ohio passed an act authorizing such company to extend its road to Cincinnati. In the act Ohio declared its intention to be to recognize, confirm, and adopt the charter granted by the State of Indiana, or, in other words, equivalent in legal meaning and effect, to recognize and adopt the corporation

which had been created by the latter State. This corporation, in its capacity of an adopted corporation of Ohio, brought an action against a resident of Indiana in the circuit court of the United States for the district of Indiana. The defendant interposed a plea to the jurisdiction of the court, and it was held on error to this court that the corporation existed in each State as a separate and distinct corporation, but the action as brought was equivalent to a joint action by such corporations, and could not be maintained against the residents of one of the States.

Ohio and Mississippi R. R. Co. vs. *Wheeler*, 1 Black, 286.

If, as held by this Court, the corporation existed, as such, in the State of Ohio, it did so simply by virtue of its recognition and adoption by that State. If Ohio may adopt a corporation of Indiana, why may not the United States adopt a corporation of California? If it can be done in the one case it can certainly be done in the other. It becomes, then, simply a question of intention on the part of Congress.

The Central Pacific case shows that by the act of July 1, 1862 (12 U. S. Stats., p. 489), Congress caused a railroad to be constructed from Omaha to San Francisco. For that purpose the Union Pacific Railroad Company was created, as was the Atlantic and Pacific, and the Central Pacific was selected and adopted. The Central Pacific, before the passage of that act, was a mere State corporation, which had been formed for the purpose of constructing a railroad from Sacramento, in California, to the eastern boundary of that State, a distance of about one hundred miles. Under its articles of association it had no power to build a road from San Francisco to Sacramento, nor to build a road across the eastern bound-

ary of the State into and across the State of Nevada and into the Territory of Utah, to the town of Ogden, there to connect with the Union Pacific, yet Congress authorized and empowered it to construct a road from San Francisco to Ogden, a distance of more than eight hundred miles, and passing through different States and Territories. Congress bestowed upon it powers which it did not possess under the laws of California—the power of eminent domain, to be exercised in Nevada and Utah, and the power to exist as a corporation and exercise corporate franchises outside of the State by which it had been created and inside the Territories of the United States, and also the power to consolidate with the Union Pacific and other companies named in the act. Congress also authorized it to issue bonds to twice the amount per mile which it was authorized to issue under State laws. Congress also subjected the company and the road which it was authorized to build to the same conditions, regulations, and restrictions which were imposed upon the Union Pacific and its road, and asserted over it and its road the same rights of supervision and control. Congress reserved the right, in certain contingencies, to forfeit to the United States the road and all other property of the company; to take possession of the road and appropriate its earnings to the use of the United States; the right to regulate the charges of the company for transportation of persons and property, and also the right to alter, amend, or repeal the law under which the company was to act in building, maintaining, and operating the road. This last power Congress has since exercised in passing the sinking-fund act, which act, in the sinking-fund cases, this Court has declared to be valid legislation.

In view of all this, can it be said, with any show of reason, that the Central Pacific remains a mere State corporation?

On the contrary, may it not be justly said that it has been adopted by the United States, and made, in respect to its road and the management thereof, a national corporation.

Let us see to what anomalous results a contrary doctrine would bring us.

Congress certainly intended to construct a road which was to be a post and military road for all times. It bestowed upon the Union Pacific Company not a life for years, but immortality. It required the road to be of uniform gauge from Omaha to San Francisco. It required the whole road to be operated as one continuous line, and required the companies to maintain uniform charges for the transportation of persons and property; and also to keep and maintain the road in good repair and ready at all times for the use of the United States in respect to the transportation of the mails, troops, and munitions of war. It required the companies in the use of the road to give preference at all times to the Government of the United States.

Under the laws of California the Central Pacific Company can exist for a term of fifty years only from the date of its creation. California may require all railroads which are subject to her jurisdiction to establish such a gauge as she may think best calculated to promote the safety of passengers and property. She may establish such charges for transportation as she may think just and reasonable. She may exact for herself a preference in the use of the road. She may repeal the act under which the company was formed and deprive it of its corporate franchises. In short, she has the power, if the company be held to be a mere State corporation, of antagonizing and defeating each and

all the plans and purposes of Congress—the power to hinder, delay, impede, embarrass, and burden the operation of a law which Congress has enacted for the purpose of carrying into execution some of the constitutional powers of the Government of the United States. What California may do Nevada and Utah, when it shall become a State, may each do Each of the three may adopt, in respect to the company and its road, distinct lines of policy which may be at war with each other, resulting in an irrepressible conflict completely destructive to the uses and benefits intended to be subserved by Congress.

The Government of the United States cannot acknowledge the existence of such powers, without at the same time preparing the way for the possible obstruction and defeat of its own constitutional measures. The existence of such powers is incompatible with the supremacy which is secured by the Federal Constitution to the Government of the United States and all its laws which may be constitutionally enacted.

If the Central Pacific Company exists as a corporation in the State of Nevada or the Territory of Utah, it does so, not by virtue of the laws of that State or Territory, nor by virtue of the laws of California, but by virtue of the laws of the United States. Suppose the State of Nevada should charge the company with usurpation, and should by *quo warranto* seek to establish its non-existence as a corporation in that State, and its lack of authority to maintain and operate its road, and suppose the courts of that State should adjudge the company to be a usurper and by decree should strip it of its usurped corporate and other franchises, and forever enjoin it from the further use and enjoyment thereof, would such a decree put an end to the existence of the com-

pany? Would it extinguish the right of the company to maintain and operate its road for the use and benefit of the United States, or would the company still continue to exist and still have the right to maintain and operate its road for the benefit of the public and the Government of the United States, under and by virtue of the laws of Congress?

Again, suppose California should repeal the law under which the company was first formed, which she has the power to do, would the company cease to exist as a corporation, either in California, or Nevada, or Utah? Would the act of Congress under which the company acted in building its road become inoperative? Would all the ends sought to be accomplished by Congress in causing the road to be constructed be defeated, or would the company continue to exist and enjoy all its present rights and franchises under and by virtue of the laws of the United States, and still be able to subserve the ends of Congress.

Again, suppose the Legislature of California should conceive the idea that a wider or narrower gauge than that which Congress has established for the road would better promote safety or in other respects better subserve the interest of the public, and should by law attempt to establish such other or different gauge; would the company be bound to adopt such new gauge? Such a change would defeat the object of Congress in requiring a uniform gauge, viz., to cheapen and facilitate the transportation of commodities from ocean to ocean.

Again, as already stated, the Pacific railroad act of 1862 contains a provision which enables all companies named therein to consolidate. Such a course would more conveniently accomplish the purposes of Congress; hence the power was granted. A similar provision is contained in the rail-

road laws of California. But suppose the Legislature of that State should come to the conclusion that such consolidations are prejudicial to the interests of the public, and should amend the law so as to prevent such consolidations in the future; would such action on the part of the State prevent the company from consolidating with the Union Pacific and other corporations named in the act and thus defeat, in a measure, the objects of Congress, or would the company still have the power to consolidate?

All these illustrations, taken directly from the laws of Congress, and the facts, by the light of which such laws must be read and interpreted, clearly show, as it appears to me, that the Central Pacific Company is not a mere State corporation, with a short life before it and subject to the laws of California, but that it has become, by adoption, a national corporation, which the National Government, in order to accomplish its purposes, has endowed with immortality and vested with other franchises which it did not possess in its former estate.

I have said nothing in this brief as to the power of Congress under the Federal Constitution to build post and military roads, or to cause them to be built by corporations created or adopted for that purpose. Whatever doubts may have once existed upon that subject have long since ceased to be entertained by jurists or statesmen. From an early day in the history of the Government the power has been exercised. In 1806 Congress passed an act by which the President was authorized to cause a road to be opened from the frontier of Georgia, on the route from Athens to New Orleans, and also a road or roads through the territory then lately ceded by the Indians to the United States, from the river Mississippi to the Ohio, and to the former Indian boundary

line which was established by the treaty of Greenville, and also a road from Nashville to Natchez. In the same year Congress also passed an act "to regulate the laying out and making a road from Cumberland, in the State of Maryland, to the State of Ohio." These acts were passed during the administration of Jefferson, who belonged to the school of statesmen who insisted upon a strict construction of the Federal Constitution. (2 Story on the Constitution, sec. 1138.)

If Congress may cause a wagon road to be constructed for postal and military use, no one will contend that it may not also cause a railroad to be constructed for the same use. Congress is not denied the right to employ, in carrying into execution the powers of the Federal Government, the latest and most improved means which science, or invention, or discovery has placed at the service of all.

In the Florida Telegraph Case (96 U. S., p. 1), speaking to this question, Mr. Chief Justice Waite said, at page 9:

"Since the case of *Gibbons vs. Ogden* (9 Wheaton, 1) it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post offices and post roads are established to facilitate the transmission of intelligence; but commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

"The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, and from the coach and steamboat to the railroad, and from the railroad to the telegraph, as the new agencies are successively brought into use to meet the demands of increasing population and wealth.

They were intended for the government of the business to which they relate at all times and under all circumstances. As they were intrusted to the General Government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State legislation."

In harmony with such views various acts have been passed by Congress in the exercise of the postal, commercial, and military powers of the General Government, providing for the construction and regulations of railroads, among which are the Union and Central Pacific act of July, 1862, the Atlantic and Pacific act of July, 1866, the Texas and Pacific act of March, 1871, and the act of July, 1866, in relation to the Northern Pacific railroad. The constitutionality of these acts has never been doubted or questioned.

The relation which Congress intended to establish between the General Government and these post and military roads is illustrated by a passage in the nineteenth section of the Texas Pacific act: "No act of the company, nor any law of any State or Territory, shall impede, delay, or prevent the said company from performing its obligations to the United States."

By the action of Congress in the premises the defendants in error have been converted into national corporations, subject to the supervision and control of Congress. Their roads are national, post, and military roads, and in the spirit of the case last cited it is not only the right but the duty of Congress to see to it that these defendants, in the exercise of their franchises, are not obstructed, embarrassed, impeded, or burdened by State legislation, or by the lack of such legislation.

If this legislation of Congress has not had the effect to convert the defendants in error into national corporations exclusively, it, at least, has had the effect—as in the case of the Indiana and Ohio corporation—to endow the defendants with a dual existence, in one of which they had the rights and franchises in question directly from the United States, and are entitled to possess, and exercise them independently of the State of California. If the consent of the State was necessary, which I deny, it has been given in the most formal and authentic manner by the passage of the acts of the Legislature of the State of California hereinbefore quoted.

From the foregoing views, if they be correct, it results that the existence of the rights and franchises in question depends in no respect upon the laws of California, or upon the acts of the defendants in error under such laws, but solely upon the provisions of the Atlantic and Pacific act of July, 1866, the Texas and Pacific act of March, 1871, and the Union and Central Pacific act of July 1, 1862.

The foregoing views find ample support in the opinion and judgment of this court in the *Pacific Railroad Removal Cases* (115 U. S. Rep'ts., 2).

V.

As to Whether Corporations are Entitled to the Protection of the Fourteenth Amendment to the Federal Constitution.

Upon this point I have said all I desire to say in my brief in the San Bernardino case (*No.* 619), at page 69, to which the Court is referred.

VI.

As to the Constitutionality of the Pretended Act of the Legislature Amending Section 3664 of the Political Code of California.

As already stated, this point is not involved in the San Bernardino case (*No.* 619), but in my brief in that case I have said all I desire to say in regard to it at page 83, to which I refer.

VII.

As to whether the Constitution of California, in Relation to the Taxation of the Property of quasi Public Corporations, is Repugnant to that Clause of the Fourteenth Amendment to the Federal Constitution which Provides that no State shall deny to any Person within its Jurisdiction the equal Protection of the Laws.

In my San Bernardino brief (at page 90) I have endeavored to show what rule of law the framers of the Fourteenth Amendment intended to establish by the use of the words "the equal protection of the laws;" and at page 97 I have also endeavored to show that laws enacted in the exercise of the power of taxation, for the purpose of providing means to carry on the Government, are not excepted from the operation of that clause of the Fourteenth Amendment; and at page 108 I have endeavored to show that the constitution and laws of California in relation to taxation deny to railroad and other *quasi* public corporations "the equal protection of the laws" guaranteed by that Amendment; and at page 122, in answer to the contention upon the other side, that, notwithstanding the Fourteenth Amendment, a State has the power

to classify property for the purpose of taxation, and that California, in the adoption of her constitution and in the enactment of her laws, so far as they deal with the subject of taxation, has merely exercised her power of classification in a reasonable and constitutional manner, I have endeavored to show that this so-called classification is not in any respect a classification of property, but is a classification of owners of property; that such classification is not based upon kind or use or other difference in property, but upon the sole fact of ownership. Upon this question I have something more to say.

That this supposed classification is not a classification of property according to its nature, kind, or use, or otherwise, but according to ownership, is clearly and conclusively apparent from the language employed in the Constitution. There is an obvious mistake in punctuation in the language I am about to quote. The period which is placed after the word "thereby" should have been placed after the word "corporations" in the next line. In the interpretation of laws, punctuation may be disregarded, or the interpreter may punctuate to suit himself. In quoting the passage in question I shall, therefore, put the period after the word "corporations." It then reads as follows:

> "A mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, *except as to railroad and other* QUASI *public corporations.*"

In view of this language, does the point in controversy admit of argument? The word "property" is not qualified or limited in any way; it therefore includes all kinds of property, real, personal, and mixed, and all kinds of each of

these classes. The exception is not confined to *railroad* and other *quasi public property*—that is to say, property affected by a public use. Had such language been used it might be said that the framers of the constitution intended to separate all property affected by a public use from all other kinds of property, and subject it to a different mode or system of taxation. Such property could have been classified by enumerating its various kinds, as railroads, telegraphs, canals, elevators, telephones, water-works for the sale of water, ferry-boats, etc., or by a general description, which would include all, as, for example, property affected by a public use. This mode of classification would have naturally suggested itself to the minds of the convention, had that body intended to classify *property*, and the fact that they employed other language clearly shows that they intended no classification of property; that they intended to do precisely what they did do. They intended to separate *quasi* public corporations from private corporations and natural persons, and subject the former to one mode of assessment and the latter to another mode of assessment less burdensome. I have no hesitation in so declaring, because I know the temper and character of the majority of the members of that convention; because I know what they were pleased to call their anti-monopoly sentiments, and because I know the popular clamor and prejudice against railroad corporations which existed at the time the convention assembled.

It was well known to every member of the convention that these corporations held large bodies of land granted to them by the United States and much other property not affected by a public use. By no rational classification of property could such property be taxed by a more onerous system than that provided for private corporations and

natural persons owning property of the same kind. Hence the idea, if ever entertained, of classifying property was abandoned, and a classification of owners was adopted.

That this classification is of the character claimed by me is easily demonstrated by numerous examples and illustrations, some of which are furnished by the records in these cases and some of which are furnished by common knowledge and observation.

By no rational or legal system of classification can farming and grazing lands be put in the same class with railroads or other property affected by a public use, yet this has been done in these cases.

The Central Pacific Company owns large and costly workshops, in which locomotives and cars and many other things, for itself and others, are manufactured. They are covered by a mortgage; they are not affected by a public use, are not railroad property, yet in ascertaining their value for the purposes of taxation the mortgage is not deducted *because that company is a quasi public corporation.* If the Pullman Car Company was doing its business—being of the same kind—in the State of California, and its shops were covered by a mortgage, the assessor would deduct it in assessing the shops, *because the Pullman Car Company is not a quasi public corporation.* He refuses to deduct in the case of the Central Pacific because it is a *quasi public corporation.* Yet in both cases the property of each under any natural, rational, or legal classification would fall into the same class.

There is in San Francisco a corporation known as the United Carriage Company. It owns a large number of public carriages and carries on the business of hackmen or common carriers. In assessing its property mortgages are not deducted, *because it is a quasi public corporation.*

In the same city there are numerous natural persons also engaged in the *quasi public* business of hackmen. In assessing their property mortgages are deducted *because they are not quasi public corporations;* yet their property, like that of the United Carriage Company, is affected by a public use, and belongs to the same class.

The records in these cases show that there is a railroad in California owned and operated by a natural person. In assessing it, mortgages, if any, are deducted, *because he is not a quasi public corporation.*

The Central Pacific owns and operates a railroad. In assessing it, mortgages are not deducted, *because the owner is a quasi public corporation.*

A, B, and C organize a corporation, build an elevator, and go into business. In assessing their elevator mortgages are not deducted, *because they are a quasi public corporation.*

D, E, and F, in their natural capacities, build an elevator and go into business. In assessing their elevator mortgages are deducted, *because they are not a quasi public corporation.* Should they, however, in a moment of forgetfulness, erect themselves into a corporation their elevator, still an elevator and still put to the same use as before, would be assessed without any deduction on account of mortgages.

I might continue these illustrations *ad infinitum*, but *cui bono?* If the foregoing do not demonstrate the proposition for which I contend demonstration is impossible.

The difficulty of establishing the proposition that this so-called classification is a classification of property seems to have been apparent to at least one of the counsel who argued these cases on the part of the State in the court below. In the brief filed by the attorney general in the San Bernardino

case (No. 619), at the top of page 30, he is quoted as having said:

"The State can classify property when owned and used by a corporation, from the very fact that it is owned and used by a corporation."

This, if I understand the learned counsel, means that property may be classed not according to kind or use, or other intrinsic difference, but according to ownership. This extreme view was certainly not taken for any other reason than because he had become convinced in his own mind that the classification in question is based on ownership. By taking this position he virtually admits the proposition for which I contend. I dissent from such a doctrine. It is tantamount to saying that corporations are not under the protection of the Fourteenth Amendment; that they have no rights which legislative or judicial bodies are bound to respect —a doctrine, I think, which no one else entertains. But to what extent will the learned gentleman carry his doctrine? Ought all corporations to be treated alike, subjected to the same rule, or may they be subdivided into separate classes, and to what extent? If the latter can be done, where does classification end and individualization commence? It seems to me the gentleman's logic turns upon itself and renders all classification impossible. I submit, in conclusion, upon this point, that there can be no classification of property for the purposes of taxation which is not based upon conditions which are inherent in the property itself, without regard to the fact of ownership, and which is not made in conformity with some standard furnished by the property itself or the use to which it is put.

VIII.

As to due process of law.

Upon this subject I have nothing to add to what I have said in my brief in the San Bernardino case (No. 619), at page 130, to which I refer.

IX.

As to whether the Discrimination in Question can be Regarded as an Exercise of the Power to Alter, Amend, or Repeal laws under which Corporations are Formed.

Upon this point I have said all I desire to say in my brief in the San Bernardino case (*No.* 619), at page 144, to which I refer.

X.

As to the Effect of the Covenants in the Mortgages in Question to Pay all Taxes imposed upon the Mortgaged Property.

This point is not discussed in my brief in the San Bernardino case (*No.* 619).

The covenant is the same in both mortgages, and is in the following words: (*Santa Clara case, No.* 464, at foot of page 25; *The People, etc.*, vs. *Central Pacific, No.* 621, at middle of page 54.)

"And the said party of the first part hereby agrees and covenants to and with the said parties of the second part, and their successors in said trust, that it will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which shall or may be imposed upon the property herein described and hereby mortgaged and

every part thereof, and the said parties of the second part, the survivor of them or their successors in said trust, or any one or more of the holders of said bonds, may, in case of default of the said party of the first part in this behalf, pay and discharge the same and any other lien or incumbrance upon said property which may in any way, either in law or equity, be or become in effect a charge or lien thereon prior to these presents, or to which this mortgage may be subject or subordinate, and for all payments thus made the parties so making the same shall be allowed interest thereon at the rate of seven per centum per annum, and such payments, with the interest thereon, shall be and are hereby secured to them by these presents and declared to be payable and collectible in the same sort of currency or money wherein they shall have been paid, and the same shall be payable by said party of the first part to said parties of the second part upon demand in trust for the party or parties paying the same, and may be paid out of the proceeds of the sale of said property and franchises hereinbefore provided."

It is claimed upon the other side that, by reason of this express covenant, these companies are bound to pay the taxes upon the interest of the mortgagees in the mortgaged premises, as well as the taxes upon their own interest, and hence are not injured by the unjust discrimination in question and can, therefore, not be heard to complain.

Much importance seems to be attached to the fact that this covenant is an express covenant—that is to say, has been put into words which are found in the mortgage. So far as this point rests upon that fact it is untenable. The legal effect of the mortgage would be the same if it did not contain this covenant. Were the covenant not in the mortgage it would be implied. Such is the rule in equity. The mortgagor is bound to pay all taxes *lawfully* imposed upon the mortgaged premises, and if he does not, the mortgagee, for the purpose of protecting his security, may pay them

and hold the amount as a claim against the property and secured by the mortgage.

Jones on Mortgages, vol. I, secs. 77, 358.

Id., vol. II, secs. 1134, 1597.

The implied covenant in such case would be to pay *lawful* taxes, and the express covenant, although the word "lawful" is not used, cannot be construed to have a broader meaning. It is to be read as if the word "lawful" had been inserted at the proper place.

As between the State and the mortgagor the covenant of the latter—express or implied, as the case may be—entered into with the mortgagee, to pay all lawful taxes, can have no possible effect upon the right of the State to recover, or the liability of the mortgagors to pay. There is no privity or contract relation whatever between the State and mortgagee, by reason of which the former may step into the shoes of the latter and compel an observance of the covenant on the part of the mortgagor; nor is there any such relation between the mortgagor and mortgagee as precludes the former from contesting the taxes before paying them if, in his judgment, they be illegal in whole or in part.

But a very simple and conclusive answer to this point is this:

In order to recover, the State must prove a tax levied according to law—that is to say, a *valid* law. A tax cannot be levied except by virtue of a *valid* law. If the law, or pretended law, under which the tax be imposed be invalid, the tax is also invalid and cannot be recovered. We might as well say that a plaintiff in ejectment can recover, even though he shows no title or right to the premises, because the defendant is without right or title.

This point was fully discussed by Mr. Justice Field and the circuit judge in the opinions delivered in the Santa Clara case (*No.* 464, *Record*, at foot of page 109 and page 138), and, in view of what they have said, I do not find it necessary to prolong the discussion of this point.

I respectfully submit that the judgments in all these cases should be affirmed.

S. W. SANDERSON.

This point was fully discussed by Mr. Justice Field and the circuit judge in the opinions delivered in the Santa Clara case (*No.* 464, *Record*, at foot of page 109 and page 138), and, in view of what they have said, I do not find it necessary to prolong the discussion of this point.

I respectfully submit that the judgments in all these cases should be affirmed.

S. W. SANDERSON.

118-394 447

FILED
FEB 4 1886
CLERK

CALIFORNIA RAILROAD TAX CASES.

Supreme Court United States.

No. 464.

THE COUNTY OF SANTA CLARA, Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

No. 619.

THE COUNTY OF SAN BERNARDINO, Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

No. 620.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,

vs.

THE NORTHERN RAILROAD COMPANY.

No. 621.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

No. 622.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

Oral Argument of GEO. F. EDMUNDS, for Defendants in Error.

THOMAS MCGILL & Co., Law Printers, Washington, D.C.

CALIFORNIA RAILROAD TAX CASES.

IN THE

Supreme Court of the United States.

THE COUNTY OF SANTA CLARA, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 464.
THE COUNTY OF SAN BERNARDINO, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 619.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE NORTHERN RAILROAD COMPANY.	No. 620.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 621.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 622.

Oral Argument of GEO. F. EDMUNDS, for Defendants in Error.

MAY IT PLEASE YOUR HONORS:

In the present state of my voice I must condense what I have to say and confine it to two principal subjects of con-

sideration. I beg your Honors' careful attention to the provisions of Article 13 of the State Constitution. If we can ascertain what it clearly says and clearly means, we shall know precisely what the question that it presents is as affecting the securities established by the fourteenth amendment of the Constitution of the United States for the protection of private and personal rights. It begins by declaring that "all property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." This is a sweeping and fundamental declaration concerning *property* and nothing else, and it declares a principle of perfect justice and equality. The Constitution then proceeds to define what property is, and it declares it to include "moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." It then—omitting in my reading a clause not bearing on this question—proceeds to say:

"The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona-fide* residents of this State."

It will be seen, then, that, if perfectly clear and accurate language can establish it, the State of California in this scheme of taxation did not propose to tax anything which it had described to be *property* otherwise than *as property*, and on a principle of equality according to *value;* and it also provided that debts secured by mortgage should *not* be deducted from the value of the property of the debtor for the purposes of taxation.

That is my first proposition; and if language can have any force at all, the sovereign power of California in creating this Constitution has said, so far as it respects the matters contained in this article, it is dealing with property

as property, and it is not dealing with any faculty, or function, or privilege, or exertion whatever.

Of course it is within the actual power of this court, or any other court of last resort, to say that these people did not make the kind of Constitution that they meant to make, and that, therefore, whatever rights or duties may arise under this article of the Constitution are to be treated as other and different rights and duties and situations than those that the Constitution itself has by these definitions imputed to it. Of course that will not do. I need not take any time about that.

So, I beg your Honors to consider as really the key, the first step in the survey you will make of this business, what the State of California has itself declared, so far as it respects this matter that we now have in hand, not denying that it has the right to grant and tax licenses to peddlers, and all that sort of thing, but that it is treating property as property; and in that definition of property it includes franchises without respect to whether they are corporate franchises or franchises conferred upon individuals, but all franchises, all moneys, all credits, which are these mortgages. There can be no mistake about that, because by whatever paraphrase, by whatever amount of phraseology you may go through with, when you get on to these other provisions that I am coming to presently, the substance of the thing is that it is a question of taxing the credit of the lender of money on a mortgage. There is no possible dodging that. That is what it is.

The State has defined what they are that this case has to do with, and this article of the Constitution has to do with as the subject upon which it proposes to operate, and how these various things that it names are to be treated and to be defined—not privileges, licenses, occupations, but property, both in things and in credits—and according to their worth they shall be assessed. Then it makes the little exception about growing crops, which I need not go into. It

then provides—which illustrates and illuminates this whole thing it seems to me—in the last clause of the first section:

"The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona fide* residents of this State."

If the ordinary debtor, the borrower of money not on a mortgage, owes a resident of the State of California, then the Legislature is authorized to make a deduction for him; if he owes a resident of some other State, not California, then that debtor shall not have any deduction. That is not in this case, but it illustrates and, I repeat, illuminates what the meaning of this whole business is. When the question arises it will not be a difficult one to decide, I take it, on that clause.

Now we come to the fourth section; but before coming to it you will observe in the first place that nothing is yet said about whether the owners of this property are to be corporations, or private persons, or whatever. It is speaking of property as property, and when it speaks of providing for deductions from credits of debts it makes the exception of credits secured by mortgage or trust deed, which is perfectly correct, leaving out the residence in the State; because when it goes on with its system it is merely taxing the creditor and not taxing the debtor for what he has not got. It taxes the creditor for the money invested in the hands of the debtor, and it taxes the debtor for what he has really got after his debts are paid, and the creditor for his property invested in security on property.

Then we come to the fourth section:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby"—

And I do not care whether you read right on—"except as to railroads and other *quasi* public corporations"—or whether you stop, as the Constitution does; it does not

make any difference. I will leave out "except as to railroads and other quasi public corporations," so as to read it continuously:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected."

That brings it into perfect harmony and apposition with the preceding section, which provides for deduction of debts not secured from credits, so as to tax a man for what he really has, and then as to the mortgage, and deed of trust, &c., it provides that the taxation there, instead of being against the person of a creditor in form as of money due to him, shall be deemed to be an interest in the real estate, (which is, of course, within the jurisdiction of the State,) and that the real estate shall take the place of the credit due to the creditor wherever he may be; and as real estate within the jurisdiction of the State, it is liable to taxation; so that equality so far is preserved.

Now go on and leave out the exceptions for the moment. We will suppose there is not a railroad or other *quasi* public corporation in the State of California. Then it says:

"In case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract or obligation, less the value of such *security*,"

—*i. e.*, the evidence of the debt, the sum invested on the mortgage—

"shall be assessed and taxed to the owner of the property."

"Less the value of such *security*," not the value of an indivisible part of the land, although it is only another way of putting it, but the value of the security, that is, the sum that the lender has lent to the mortgagor,

"less the value of such security, shall be assessed and taxed to the owner thereof;"

that is, to the owner of the property, "in the county, city or district in which the property," which is morgaged to secure the debt, "is situated."

Now, that is what it provides. There it is perfectly equal, for the reason that, leaving out this provision about unsecured matters, with which I have nothing to do now except to illustrate it, there is perfect equality. The debtor in either case is authorized to deduct,—and the public authorities are bound to make it,—the amount that he owes secured on his land or property of any kind, though it is not real estate, because it does not say real estate; it says everything. Whatever is secured by mortgage or deed of trust upon property that is within the line of the State, to the extent of the debt that that debtor owes, the Constitution provides shall not be taxed to him. In other words, he shall not be taxed upon what he owes, but the man to whom he owes it rightfully shall be taxed; and the State gets its hands upon that man, whether he is within the State or without it, by attributing the amount of that debt to a proportionate interest, the value of what the mortgage security is; and thus you get entire equality. The man who owes unsecured debts the Legislature is authorized to relieve, and the man who owes secured debts, no matter where the creditor may live, is relieved, and he is authorized to deduct the amount that he owes in the valuation of his property.

Now, that being so, and being therefore perfectly equal, speaking of private persons, (for I will dismiss entirely the question of corporate existence for the purpose I am now speaking of,) suppose the Legislature of California had provided that every person who owed a debt secured by mortgage to any person not residing in the State of California should not be authorized to make that deduction, and that every person owing a debt secured by mortgage to a citizen of California should be authorized to make that deduction, would anybody maintain that that would hold

fire if the fourteenth amendment means anything at all? Can it be that the equal protection of the laws depends upon the residence of the person who has lent money to the debtor who is seeking the equal protection of the laws? That would be a distinction that my learned friend on the other side would hardly call a lawful classification.

Suppose the Legislature of California under this provision, or this constitutional provision itself, should provide that every person owning property in all counties but one should be entitled to make a deduction on his mortgage debts, would that give equal protection? What becomes of the other man, the mortgagee, is nothing to us and nothing to this case. Whether the Legislature can reach him or it, or cannot, is nothing to us on the question of equality, because the equality of the burden to the man who is within the jurisdiction of the State cannot depend upon where or how situated the man is with whom the State may or may not have to do as a creditor.

Suppose the Legislature or the Constitution had said, those citizens of California who own land in one county may deduct the amount of their mortgage debts from the value on their estate, that is, the assessed value; those who own land in two counties, or the same body of land lying in two counties, shall not be entitled to make any such deduction,—would that be a classification that anybody would for a moment pretend could be made to stand?

Suppose you refer it, as in this case, to some quality or nature of the person as distinguished from the nature of the property, could it be made to stand? Can you say that all persons of the Anglo-Saxon race may deduct their mortgage debt, and that all persons of the Mongolian race shall not deduct the amount of their mortgage debts? The Supreme Court of California, with whatever bias it may have against the Mongolian, would hardly say that that would hold, even if it were in the Constitution. Yet every statement that I have now made, I submit with great re-

spect, illustrates perfectly this discrimination that is made in this Constitution against, not particular classes of property, but against the particular kind of person who happens to own the property. I do not now say railroad property, or ferry property, or any particular kind of property, but, taking the language of the Constitution itself, its fundamental first section, property of whatever kind.

The point of this business was, I think, a little different, or other or further than that which Mr. Justice Miller suggested. The Constitution said that railroad and other quasi corporations should not be entitled to this deduction in respect of any property whatever. It did not provide that in respect of the faculties and franchises that the State had conferred upon them they should be taxed by themselves and in such sum as the Legislature in its wisdom might think fit—far from it—but in respect of *any* property that that particular class of persons, not of things, who were found to be the owners of property of any kind should not be within the protection of this Constitution and should not stand on an equality with the owners of other property of any kind, whether similar or other.

Now, what was the policy? I think I can see it, having had considerable to do in another place with the scope and operation of railroad laws. Here were these two great California railroads—the Central and the Southern Pacific—one of whom had been enabled only to exercise the franchise (whether State or National I do not mind now) and do the things that both the State of California and the Congress of the United States desired that for great public interests it should do, by borrowing immense amounts of money—$30,000,000 in round numbers I will say. It gave a first mortgage on everything it had of every description—franchises, rolling stock, shop stock, roadway, other property, granted lands, everything—to raise the $30,000,000 to build the road, while a similar mortgage of $30,000,000, created by statute of Congress alone, but

equally a mortgage, as we all know, was given to the United States of America.

Now, the people who made this Constitution saw that if railroad mortgages on whatever property were put in the same category as the mortgages of all other corporations and all other individual persons, when the taxing officers came to assess the railroad, by a deduction that every other person and corporation had on the amount of its mortgage debts from the value of its mortgaged property, there would be nothing left to assess upon at all, because the mortgages, the $60,000,000, are infinitely greater, four times greater, than the value of the property, four times greater than this State board assessed it at, although they doubled the return of the company officers made in pursuance of law in respect of which the State had a right, I admit, to require a return. But they would see that the whole value must be assessed as a debt due first to the first mortgage bondholders, who could be reached like all other mortgagees, and, second, to the United States. As it regarded the first mortgage bondholders, being private persons, leaving out the Federal question entirely now as to the nature of corporations, and it being enveloped, in the language of Mr. Justice Bradley, in the systematic operations of a superior government as we have supposed in such a question, they could be assessed under that first principle entirely. Therefore, if there had been but this first mortgage of this railroad, treating it as property, and all its property, under the same provision which provided for the deduction to the mortgagor of the amount that he owed on his mortgaged lands and property, it could be assessed as an interest in the land, as we find it, in the real estate, in the whole concern, to the bondholder, wherever he was. But when it came to the $30,000,000 of the United States, double what the property is assessed at and is worth, then the question would immediately arise whether the State of California was so much superior to the United States as to be able to

make the United States an owner to the extent of its debt in that land and assess it as land or a credit against the United States. Of course it would be preposterous. That would not hold a moment.

Therefore, your Honors will perceive that the policy of this business was not the policy of drawing into the taxation of the State everything that it could lay its hands upon, (which is right, if you want to do it equally,) but the policy was to tax the investment that the United States had made of $30,000,000, double what the whole property was worth, against the corporation, when it could not assess it and tax it against the United States.

This deviation, therefore, was necessary, and most ingeniously contrived, looking very sweet and fair upon its face, as was said upon the other side, in order to tax a debt due the United States against the owners of this property, by taxing the whole property without deduction, to the owner,—when if they taxed it upon the same rule of equality and fair play that they had provided for everybody else,—when if they had applied the same rule of deduction in that case that they did to everybody else, as they would have done if the United States had not been the creditor, they could not have done it at all. There was the rub. It might as well have been said in terms that all save certain enumerated persons should have their mortgage debts deducted, but that those persons should not deduct debts due the United States.

The CHIEF JUSTICE: That does not apply to the Southern Pacific?

Mr. EDMUNDS: No, if your Honor please, I am now speaking of the Central Pacific.

Mr. EVARTS: It was necessary to cover the Central.

Mr. EDMUNDS: It was necessary to cover the Central, of course, and, therefore, the general provision was made. So the outcome of this business will be,—and your Honors are bound to look at it and take judicial notice of it,—if

you reverse these judgments you have put the seal of your approval upon a device to make one debtor in the State of California, one person who owns this property, pay a tax which, upon the principles of the rest of the Constitution applied to everybody else in that State, he should not pay a cent upon, merely because his mortgage creditor happens to be a sovereign whom the State of California has no power to tax.

That is the proposition; and I submit with confidence and with great respect that it is a proposition which will require considerable thinking to get over. Here was to be under the fourteenth amendment of the Constitution an equality of protection, and an equality of protection is an equality of burden, other things being equal. If a corporation is a person entitled to the protection that the fourteenth amendment gives to private persons, then if my brother Judge Rhodes had stood in the same relation to this mortgage and to this railroad that the corporation does, he would have been taxed under this Constitution for property which was not worth a penny, and would have been allowed no deduction for the debt that he owed upon it which made it to him not worth a penny, when my brother Sanderson, owning property as property, and I will add, if it makes any difference, owning precisely the same kind of property, was not taxed and could not be taxed, under the protection of the Constitution, for a single dollar. That is where it comes.

Now, in order to get rid of the fog and smoke that seem to surround the name of corporation, which I believe this court has entirely gotten over, let us suppose that the State of California had granted to my friend Judge Rhodes all the things that it has granted to the Central Pacific Railroad, and let us suppose that the Congress of the United States had done to Judge Rhodes all the things that it has done to and with the Central Pacific Railroad; Judge Rhodes comes forward with his mortgage on the

property, and he is not entitled, if he is the same as a corporation, by name, to any deduction whatever; but coming forward as Judge Rhodes, a citizen of the United States, or a human being, no matter what he is a citizen of, he is entitled to deduct because he is a personal being, the amount of that mortgage debt, and the State must tax the value of the security on that property which is within its limits to the mortgage creditors; and if it is entitled to tax it to the mortgage creditor, (and I do not deny at this moment that it might be entitled to do it,) that mortgage creditor, even if he is a Dutchman in Holland, or wherever, must pay; and if that mortgage creditor happens to be a person whom the State cannot reach, that is, the United States of America, then, in order to avoid the difficulty of not being able to collect a tax against the United States of America because it happens to be the creditor, Judge Rhodes is to be consigned, if he is a corporation, to the condition of paying taxes upon property that he does not own a single dollar of available interest in, while, if he is a private person, he is entitled to make that deduction whether the creditor is in a condition to be taxed in respect of his interest in the property or not.

Therefore you have made the distinction between the single, personal individual and the association of individuals that have got the artificial formality of what is called a corporation, and your classification, as Judge Sanderson has, as it seems to me, in his brief demonstrated, is not a classification of things to be taxed according to the nature of their use or their occupation, but it is a classification of the persons who are to be taxed because they are one kind of a person rather than another kind of a person. The same principle, therefore, would justify the State of California or any other State in making any distinctions in regard to taxation that it chose as between individual persons, and to say that men of one race, or one religion, or one occupation, should be taxed in respect of their property different

from other citizens of other races or religions. Would it do as a property tax in the State of Vermont to say that all clergymen should be taxed at a rate of 10 per cent. upon the value of their real estate, and that all other citizens should only be taxed at the rate of 5 per cent.? Of course it would not do, except you could persuade yourselves to believe that that was intended to be a tax upon the faculty of being a clergyman; and if the State had said, whether in constitution or law—it does not make any difference which to us in this tribunal, I am happy to say—if you could squeeze it up to saying that the Legislature had meant and had said so, that all clergymen should be taxed upon the faculty of being clergymen so much, measured by any standard that you please, that might do; because nobody would be bound to be a clergyman, and he could stop being a clergyman if he did not like that kind of a tax; and whether he had notice or not, if when the tax collector came to him with his warrant for a hundred dollars and he refused to pay, then he would be entitled to contest in the courts of justice the question whether he was in fact a clergyman at the time the assessment was made, and no judgment of an assessor, no judgment of a county board of equalization or supervision, no judgment of a State board, would bind him—if the fact turned out to be that he was not in the category of persons that the law had described.

Now, then, I repeat, that treating this corporation just as if my friend on the other side had been named in these acts of California and in the act of Congress, you have got a discrimination that is made not in respect of the classification of the uses that different kinds of property may be put to, but you have got your sole discrimination upon the fact of the personalty of the individual to be taxed, which is a thing, I submit, directly in the face of the provision of the fourteenth amendment of the Constitution of the United States, which says that no such discrimination shall be

made. The equality of protection is an equality of protection to men, whether they are associated or disassociated. It is a protection of equality to men; and if the sovereign power of the State is to make distinctions and classifications it must make them in regard to things, and not in regard to the owners of similar things as owners.

Now, I repeat, because I think it is of considerable consequence when we look at this scheme, that the State of California itself, has not undertaken, in this constitutional provision or in its codes, to treat the property of this railroad company as anything else or other than property. It says so by clear, careful, and precise definition; and, therefore, dealing with it as property, it turns around and says, if one man owns this property, which we say shall be taxed with equality as property, he shall not have the equality of protection and deduction and burden (because it all comes to burden at last) that the other man who owns the same kind of property, or any property as property, shall have. That is the proposition, and that being the proposition, I respectfully submit that it ought to be somewhat easy of solution.

If you could make a new constitution for the State of California, and have it read that every person, natural or artificial, who is operating a railroad, or a ferry, or a stage-coach, or an inn, or an elevator, or whatever, shall be taxed in respect of that occupation and employment and function, whether affected with a public use or not; that every merchant, if you please, (which we do not consider to be an employment affected by a public use, although it is pretty hard on the public sometimes,) shall be taxed in respect of that occupation, and provide for them all alike, there is equality. Although it may be that the merchant and the ferryman or whatever is in point of justice and fact overborne by an excessive burden, he has his equality of protection, because it bears on all similar occupations alike, and it depends upon his will whether he will pursue

that occupation any longer or not. If the function, if the employment, if the faculty, if the pursuit is taxed beyond what the citizen who is following that pursuit thinks he can bear and still get bread for his children, he can give it up; but I repeat that in this scheme which you have to try, and not another, it is not meant to stand, it does not pretend to stand, upon any such proposition, but exactly the reverse, and the distinction is made upon the man, and not upon his function or his faculty or his pursuit.

It is therefore exactly, as it seems to me, like the case of the taxation of stock in national banks, &c., which has been before your Honors and settled easily and upon sound principles, that where a State authorizes the holder of moneyed capital not national bank stock to deduct for his debts and does not authorize the holder of the national bank stock to do the same thing, it is unequal; it imposes an unequal burden upon the man because he stands in a relation to that particular kind of property as property.

So when you look carefully at this scheme in the first section,—which is perfectly sound and correct,—first, of what property is and of the equality of its taxation, and taken as property and not as faculty or function, and embraces everything that my client possesses; and then later turns around to him and says, because you are a particular kind of person you shall bear a greater burden than another kind of person shall bear in respect of the same sort of property,—then the power of the State of California has exceeded its sovereignty, and has invaded that equality which belongs to every person within the jurisdiction of that State. That is the proposition, if your Honors please, which I have stated as briefly as I may, and I hope I have been able to make myself sufficiently clear.

Now I will come—for I have not the voice to go on long—to another topic, and that is, the question of how far, treating this thing as a franchise and a faculty which as such and in the regular way the State may ordinarily

and wisely select as an object of taxation, this franchise, and I might add this roadway and road-bed, this enterprise, this undertaking, can be taxed by the State of California. This State, like every other State, has no authority to tax any agency or function which the United States within the limits of its constitutional capacity chooses to employ to transact the public business of the whole Union. I think I have stated that in such a way that it would stand criticism and be agreed to by everybody.

Then we come to the question of the faculty and the function, and the exertion of these companies as it regards the franchise, whatever that may be, and as it regards the thing, an indivisible entity, inseparable from the franchise, necessary to the exercise of that function at all. This franchise and inseparable thing I will assume is taken up by the United States of America as the one means of carrying on the interchange of military, postal, financial, civil and commercial operations between the thirty-eight States of this Union from the shore of the Atlantic to the tranquil Pacific; then you come to the question whether it is competent for a State to impose upon that thing with that function its sovereign heavy hand and say to the owner of it, being A. B., "You shall pay taxes upon this thing—because it is this thing so taken and used and as distinguished from general property, to raise the whole revenues of the State." For if the State of California has the right to say that this particular kind of property so employed shall pay one-tenth of one per cent. more in its result than other kinds of property differently employed, then, as was said in the old Bank case, as the right to tax implies the right to destroy, it has the right to say that the total revenue of the State shall be raised out of that particular line of highway, rails, track, road-bed, bridges, culverts, that are employed by the United States, and must be employed by the United States, in that one place on the surface of the earth. But, on the theory of the other side, that partic-

ular thing which must exist and be operated as absolutely essential to the intercourse of the Union, it can tax to death and bid it in itself, for its taxes, the sovereign being the State of California and not the Congress of the United States, in respect of such affairs and means of international and interstate intercourse; and so being the sovereign of the whole of that line of road within its State, and being the proprietor of it, it may manage it in its own way for its own purpose and on such conditions as it pleases to impose, for Congress cannot, I submit, exert any sovereign power over the lawful operation of States. I suppose it would hardly be contended (at least as vigorous a Nationalist as I am could not contend) if the State of New York had built, as I believe it has, a canal from Albany to Buffalo, owned and controlled and managed by the State as a State agency for the operations of its own citizens, that it would be competent for the United States of America to deal with that canal at any time, or in any way. And if the State of New York chose to say that the mail should not go on that canal it would not be within the competence of Congress to say that it should, although if that canal were owned by citizens of the State of New York, or any persons other than a State, they clearly might, under certain circumstances which I need not go into.

So we cannot shut our eyes to what is precisely this situation, and that is, that if this proceeding of the State of California is to be upheld, you must come to the conclusion that the State is the exclusively dominant power over that means of communication on that particular space of territory that connects the Atlantic with the Pacific, or rather more correctly, the Missouri River with the Pacific, which is just as good for my purpose. That is what we must come to.

So I maintain that if it be true that the United States has enveloped and taken in this thing and means that I am now speaking about—has taken it into its arms from citi-

zens of California or citizens of any other State for such national uses, it is not within the competence of the State of California. I suppose nobody would contend that, assuming Congress had the power and it had created a corporation to build a road from the city of New York to the city of San Francisco, and with the right to take private property to do it, and it had been done, that that particular line of road as distinguished from the general assets of all people, whether they were serving the Government of the United States or not, and the exertion of that particular faculty in that particular way would be subject to the interference of any State whatever.

Now, then, we come to the question whether the acts of Congress have accomplished that thing. If they have not, of course what I have said about how it would appear if they had is of no possible value. What have the acts of Congress done, whether with the assent of the State of California or without it, but it is with the assent? The State of California down to the time that it began this scheme, (although the Central Pacific and the Southern Pacific were organized, in the first place, under the authority of the general laws of the State of California,) has in every step that it has taken treated them as being people who were doing that thing as they did do that thing under the authority of the United States and for the general purposes of the Union. They have given their consent in enactments which my brother Sanderson has put into these briefs, and whatever the United States and these persons have agreed to do these corporations, organized under their authority, may do, and *must* do if the acts of Congress are *laws*. They have authorized the marriage between the Congress of the United States and this great national undertaking, and although I maintain their consent was quite unnecessary, having consented, I contend that to the extent that the faculties and functions of these corporations are exerted, both as it regards the right to be

and the right to do and the right to have, where that have covers the necessary and essential means of doing the thing that the Government has imputed to them to do, they have become not the agents, the creatures, or the subordinates of the State of California, amenable to it, governed by it, whether by taxation or by regulation, but have become the creatures and the means and the agents of the United States of America to do this great national thing within the competence, and necessary duty in fact, of Congress to do.

I distinguish all the time, I need hardly remind your Honors, between what you have said about the taxation of railroad property, the Union Pacific, &c., as a piece of property, distinguished from that part of its property, if you call it property, as this Constitution does, which is absolutely worthless except as applied to the use to which it is devoted, for then it is really the taxation of the use, of the faculty and its operation.

If it, by force of a law of the United States, has become the duty of the Southern Pacific or the Central Pacific Railway Company to have and maintain, not as a matter of contract to carry a mail, but to have and maintain as a line upon the surface of the earth from State to State and from shore to shore of this continent a line to move troops, &c., upon, and to move them, that line and that movement are intrinsically essential to obedience to the law and to its execution, and the moment any extraneous power lays its hand upon that line as a line, and that operation as an operation, it has destroyed the operation and annulled the law of Congress.

So, it seems to me, with great respect to my learned brothers, that the key to this part of the case is to see, as does not seem to be disputed so far, that this intercommunication, this anastomosis of the function and duty of the Government to provide these great highways with that State corporation which existed simply a citizen of the

State, this entire fusing of the rights, the duties, the obligations, the functions, and the things to do of this creature born in the State of California with the operations of the Government of the United States, is, so far as it relates to those operations and that essential thing, beyond the reach of the State of Delaware or the State of Vermont, if it were eastward, or of the State of Nevada or of the State of California to put it out of existence, or to impede or impair the continuity of the duty that is imposed upon it not by a contract to carry a mail, but by the sovereign operation of a law operating as law, and not as a contract to do that thing. That is the way it looks to me.

I do not think, if your Honors please, situated just as I am as to my voice, that it would be wise for me to take more of your time. My brother Sanderson has so completely and perfectly, as it seems to me, demonstrated our views in regard to the other points of the case that I should not need to add, in fact I could not add, anything to what he has said.

118-394 0417

Supreme Court U. S.
FILED
FEB 4 1886
JAMES H. McKENNEY,
CLERK.

CALIFORNIA TAX CASES.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1885.

No. 464.

THE COUNTY OF SANTA CLARA, Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

No. 619.

THE COUNTY OF SAN BERNARDINO, Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

No. 620.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,

vs.

THE NORTHERN RAILWAY COMPANY.

No. 621.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

No. 622.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

Points on the question whether the Fourteenth Amendment of the Constitution of the United States respecting "equal protection of the laws" includes taxes laid by a State.

Submitted after Argument and by leave of Court by Mr. EDMUNDS, for Defendants in Error, in consequence of an inquiry by a member of the Court.

Thomas McGill & Co., Law Printers, Washington, D. C.

POINTS

On the question whether the Fourteenth Amendment of the Constitution of the United States respecting "equal protection of the laws," includes taxes laid by a State.

Submitted after Argument and by leave of Court, by Mr. Edmunds, *for Defendants in Error, in consequence of an inquiry by a Member of the Court.*

I.

Taxes are defined to be, in a general sense, all contributions imposed by the Government upon individuals for the service of the State by whatever name they are known; whether by the name of tribute, tithe, talliage, impost, duty, garbel, custom, subsidy, aid, supply, excise, or other name. (Bouvier's Law Dictionary, title Taxes; Comyn's Digest, title Parliament.)

Taxation is simply one of many governmental powers, and it does not differ in nature from any other power that belongs to a sovereign.

II.

At the time of the adoption of the fourteenth amendment it was known that the forms and methods of taxation for supplying the treasuries of despots had always been the chief mode of injustice and misrule,—and of which the history of our English ancestors furnishes many conspicuous examples. It was also known that these methods of in-

justice were still resorted to in many countries calling themselves civilized. Of these Russia, Turkey, Egypt, and other States may be cited as examples.

It was also known that governments *in form* republican might resort to similar methods, and that, if resorted to, the rights and safety of citizens of the United States of whatever race or color might be destroyed by an aristocratic body getting control of the State governments, just as effectually in this way as by any other method of injustice and tyranny.

Can it be doubted, then, that if the language of the fourteenth amendment be apt and adequate to protection against this form of tyranny, that its framers intended to require the equal protection of all the laws to all persons, and to protect property as well as life and liberty and judicial justice, and to condemn and prohibit tyrannical exactions made under the form of taxes as well as by other methods? Did they not intend to give every citizen the protection that Chancellor Kent in his Commentaries (vol. 2, 12th edition, pp. 331–2) declares to be fundamental, viz:

"Every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all unequal and undue assessments on the part of the Government. It is not sufficient that no tax or imposition can be imposed upon the citizen but by their representatives in the legislature. The citizens are entitled to require that the legislature itself shall cause all public taxation to be fair and equal in proportion to the value of the property, so that no one class of individuals and no one species of property may be unequally or unduly assessed."

III.

Constitutions cannot wisely (and rarely do) enumerate in detail the evils to be prevented, for the enumeration of some would usually imply the exclusion of others that

were not foreseen. In the language of Chief Justice Marshall (4 Wheat., 407):

"A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

So, words comprehensive and general are used in constitutions, and almost necessarily so in clauses prohibiting the invasion of private rights as distinguished from words conferring an affirmative authority upon the legislative body. To such prohibitory words we have no right, where the language is clear and comprehensive, to make implied exceptions on account of a supposed policy that a particular power—as of taxation, which may and often does relate to the person as well as to his property, or of unreasonable searches and seizures—might or should have been left free to the States, whereby the poor and downtrodden or the minority of the citizens, or even the majority of the citizens, (as is the case now in some States,) may become subject to the unrestrained power of those who possess the machinery of the government, and thus the easy victims of every species of misrule. Such a constitution is always a barrier against all forms of tyranny, while it can never be an impediment to any of the operations of a just government.

IV.

The fourteenth amendment passed Congress on the 16th of June, 1866, and was ratified on the 28th of July, 1868.

The fifteenth amendment passed Congress on the 27th

of February, 1869, and was ratified on the 30th of March, 1870. It can (after research) be safely stated that in the history of the adoption of these amendments it nowhere appears that it was the design of Congress, or of the ratifying States, to limit or restrict the full and beneficent scope of their language.

V.

What, then, is the meaning of the words "equal protection of the laws"? If equal protection of the laws means only that whatever the statute of a State requires shall be equally required from those upon whom the statute itself operates, it is only another way of saying that whatever and all the statute requires shall be done,—which destroys the whole force of the sentence, and subjects the citizen to the arbitrary will of the State, if that will be only expressed in the form of a law. It would make the phrase a support of arbitary power rather than a prohibition of its exercise.

Government "protection" is primarily (at least in a government of laws) the defense of life, liberty and property, to be declared and maintained by law, or, in the language of a law writer, (Bouvier's Law Dictionary, title PROTECTION,) "that benefit or safety which the government affords to the citizen." "Equal protection" must, then, mean that security of life, liberty, and property which is afforded by equal laws as well as by the equal administration of such laws; for there can be no equality of protection of the laws if the laws may still be made unequal and tyrannical in respect of the security of life, liberty, and property, and may enact that in regard to the same subject-matter one citizen shall be subjected to exactions and constraints that other citizens are not subjected to under like circumstances.

That this principle covers all cases of injurious and discriminative legislation other than taxation, does not seem to be questioned, and it is recognized in Blyew *v.* United

States, (13 Wall., 590,) and also stated very clearly in the dissenting opinion in the same case. That this amendment applies to illegal taxation as well as to other invasions of private rights is fully recognized by this court in Kelly *v.* Pittsburgh, 104 U. S., p. 78. The same principle in regard to taxation, as applied to a State constitution, is recognized and declared in Cole *v.* La Grange, 113 U. S., p. 1.

If the matter of taxation is to be excepted from the operation of the equal protection clause of the fourteenth amendment upon the policy suggested, it must also be excepted, it is submitted, from every article of the whole Constitution directed to the preservation of private rights against governmental tyranny. For the supposed policy of leaving the legislative power of taxation untrammelled by one provision must be equally applicable to every provision, in order that the power of the government in respect of taxation might be without any restraint whatever either in principle, in method, or in execution; and so if the amendment does not secure "the equal protection of the laws" in regard to taxation, how can it be held to secure the citizen against taxation imposed without due process of law? The one is no more essential to security than the other.

The words "equal protection" are of the most extensive import. It is believed that none could be used more comprehensive to secure the citizen against discriminations directed against him. The Constitution itself in one of the most solemn of its commands requires that the President of the United States shall be sworn "to preserve, *protect*, and defend the Constitution of the United States;" and the Chief Justice, speaking for this court, in Cruikshank's case, (92 U. S., 551,) of the rights of the people peaceably to assemble for public purposes, declares that it carries with it "the obligation on the part of the State to afford it *protection*."

But if this amendment does not establish equal protec-

tion in regard to the almost innumerable forms of tyranny that may be included under the term taxation, the very people whose helpless condition at the time of its adoption furnished the motive (though by no means limited the scope) of that great act, would have been left the victims of a form of oppression probably more dangerous, because more insidious, than any other that their old masters could have devised. Each State whose government was in possession of the old slaveholding aristocracy could have declared in terms that all colored persons should pay poll taxes of any amount, or taxes upon their property, when none were assessed against the whites. They could have declared that white citizens who had beeu engaged in the rebellion should be free from taxation. They could have declared that all persons who could not read or write should be taxed double as much upon their property as those who could read and write. And they could do all these things still. There is no other clause either in that article or in the fifteenth, or any other in the Constitution that can be suggested, that would prevent it.

It is submitted, then, that the old idea of unlimited and unrestrained power of taxation, which once existed and which has latterly been limited and equalized in the constitutions of some States, cannot be sufficient to raise the presumption or implication suggested in the construction of this article and against its comprehensive language, that it does not cover protection and equal protection to the citizen in respect of taxation as well as in respect of all the other rights that belong to life, liberty, and property.

The contemporaneous legislation of Congress has been referred to in this connection.

The first civil rights act passed on the 9th of April, 1866, more than two years before the adoption of the fourteenth amendment. That act used very general language, declaring the citizen to be entitled "to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be sub-

ject to like punishments, pains and penalties, and to none other." (U. S. Stats., vol. 14, p. 27, sec. 1.)

The second civil rights act was passed on the 31st of May, 1870, after the adoption of both the fourteenth and fifteenth amendments. It was a House bill, devoted in that body to the protection of political rights. In the Senate it was amended by the re-enactment of the chief features of the civil rights act of April, 1866. Its 16th section used the same words as the 1st section of the act of 1866, except that it inserted in one of its clauses the words "taxes, licenses and exactions of every kind;" so that as amended and re-enacted, after the adoption of both the amendments, Congress provided that the citizen should be entitled "to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and should be subject to the like punishments, pains, penalties, taxes, licenses and exactions of every kind, and none other." Thus it will be seen that after the fourteenth amendment came into force Congress assumed the power to prohibit unequal taxation in respect of subjects within the purview of that act as one of the powers that it might lawfully exercise by force of this amendment, and accordingly enlarged the area of its provisions intended to protect the equal rights of citizens. I am enabled to state, after research, that, while nearly every part of the act of 1870 was the subject of vigorous opposition and discussion, it nowhere appears, so far as I can discover, that any opponent of the act made any question against the provisions of this 16th section. It may be also stated, as a matter of public history, that the re-enactment and reconstruction of the first civil rights act by the act of 1870 was had on account of doubt existing in respect of the validity of the first act without the aid of the fourteenth amendment. The provision was accordingly redrawn and amplified as warranted by the amendment.

GEO. F. EDMUNDS,
Of Counsel for Defendants in Error.

118-394 4417

FILED
FEB 23 1886
JAMES H. McKENNEY,
CLERK.

California R. R. Tax Cases.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

COUNTY OF SAN BERNARDINO
v.
S. P. R. R. CO.

COUNTY OF SANTA CLARA
v.
S. P. R. R. CO.,

And Three Other Cases, Nos. 620, 621 and 622.

Does the Provisions of the Constitution of California relative to the Assessment of Mortgage Interests, apply to contracts made prior to its adoption?

Submitted by Attorney-General MARSHALL by request of the Court.

IN THE

Supreme Court

OF THE

UNITED STATES.

COUNTY OF SAN BERNARDINO
v.
S. P. R. R. CO.
COUNTY OF SANTA CLARA
v.
S. P. R. R. CO.
AND THREE OTHER CASES.

Answering the communication addressed to me by the Clerk of the Court, saying, that the Court would be glad to receive from me a reference to any decisions of the Supreme Court of California on the question presented, that the 13th Article of the Constitution of the State does not apply to mortgages executed previously to the adoption of the Constitution, and any rulings of the State authorities on the subject, I state what follows:

The principle, that the new Constitution does not apply to mortgages executed before its adoption, was first announced in the case of Beckman v. Skaggs, reported in 59th California Reports, page 541.

60 Cal 367

In a subsequent case—McCoppin v. McCartney—the *dictum* of the Court *indicates* a contrary ruling; but the difference in the facts of the cases justifies a difference in the judgments. The last case was an action to cancel a tax sale, under an assessment of the mortgagee's interest. The Court refused to order the cancellation. The sale of the property taxed was a valid exercise of the power of the State. The State had a right to collect its tax out of the *property*. But when it attempts to collect the tax by a personal action, a portion out of the mortgagee and a portion out of the mortgagor, when by the terms of the mortgage contract the mortgagor had agreed to pay the whole tax, then it gives force to a law which clearly impairs the obligations of the contract.

But another point of difference is, that in the first case—Beckman v. Skaggs—the mortgage contained a covenant that the mortgagor should pay all the taxes. In the other case—McCoppin v. McCartney—no such covenant existed. So,

too, in the more recent case of Hay v. Hill, 65 Cal. 493, this difference is specially pointed out.

It may, therefore, be safely said, that our Supreme Court has determined, that where a mortgage was executed prior to the adoption of our new Constitution, containing a covenant that the mortgagor should pay all the taxes levied upon the property mortgaged, the provisions of that instrument do not apply to it.

Had the Supreme Court of California decided that the provisions of Article 13 of the State Constitution *do* apply to all mortgages made before its adoption, such decision would in no way bind the Federal Courts. The question presented is a federal one. If the State Constitution is *retroactive*, it changes the terms of all mortgage contracts made before its adoption, and thus impairs their obligations. This is prohibited by Section 16 of Article I of the Constitution of the United States. (See Murray v. Charleston, 96 U. S. 432, and cases cited in plaintiff's brief, in San Bernardino v. S. P. R. R. Co., No. 619, page 48).

Payment is resisted by the defendants chiefly because the assessment, according to which the taxes were levied, was made in pursuance of what it terms the discriminating provisions of the Constitution, in the enforcement of which the company

was not allowed any deduction from the value of ts property for the mortgage thereon, and was thus subjected to an unjest proportion of the public burdens, and denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

It is not claimed that the rate of taxation has been increased, nor that the property is subjected to a heavier burden than the other property of the State; but what is demanded by the defendant is, that instead of paying the whole tax as agreed and covenanted by them when the deed of trust was executed, they ought to be relieved of the payment to the extent of the debt secured by the mortgage, which in this case amounts to an entire exemption, as the mortgage is for more than $30.000 per mile, and the assessment but $16,500.

In other words, the defendant is asking this Court to declare that the Constitution has lifted a burden from their shoulders, voluntarily and solemnly assumed by the very terms of their contract, and laid it upon those of their creditors. It is asking the Court to so construe the provision of the Constitution as by it *new conditions* are added to the contract of mortgage, *expressed stipulations* eradicated, *new and different burdens* imposed on the one of the parties to the contract,

and *material exemptions* made in behalf of the other.

If *prospective*, it interferes with none. It must be given such construction as will not make it repugnant to the Federal Constitution.

If it is prospective in its operation, the defendants have no right to insist upon any of the privileges or immunities granted by it.

E. C. MARSHALL, Attorney-General,

Attorney for Plaintiffs in error.

118-394 9417

Office Supreme Court U. S.
FILED
FEB 25 1886
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 464.

THE COUNTY OF SANTA CLARA,
Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

CALIFORNIA RAILROAD TAX CASES.

Argument of D. M. Delmas, Esq., Counsel for Plaintiff.

IN THE

SUPREME COURT

OF

THE UNITED STATES.

THE COUNTY OF SANTA CLARA,
Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.
No. 464.

CALIFORNIA RAILROAD TAX CASES.

Argument of D. M. Delmas, Esq., Counsel for Plaintiff.

May it please your Honors: The case of the County of Santa Clara against the Southern Pacific Railroad Company, together with Nos. 620, 621, and 622, form the group to which I purpose addressing my argument. They were litigated at the same time, and come here upon findings of fact. There is another case on to-day's calendar, entitled *The County of San Bernardino* vs. *The Southern Pacific Railroad Company*, which is here upon a record made up by agreement of the attorneys of the respective parties. With that case I had nothing to do in the Court below, and have not here. It is not, therefore, covered by my argument. In what I have to say, I shall, for purposes of brevity and convenience, refer to the record of the Santa Clara case. The facts in the other three cases differ, of course, in detail, but not in essentials.

This litigation involves the validity of the Constitution and statutes of California relating to the taxation of railroads.

After a controversy covering a period of six years, the people of that State are now at your bar, to learn, at last, whether they have any laws by which the vast property of railroad corporations, which receives the protection of their government, can be made to bear its share of the public burdens, or whether the scheme of taxation, devised by the framers of their Constitution, carried out by their legislators, and approved by their highest Court of law, is an impotent nullity. They are here to learn whether, not only must the vast sums of six years' unpaid revenue, for which these corporations stand delinquent to the State, be forever lost to the Treasury, but, also, whether the expense, loss of time, and labor of reframing or amending their Constitution must be assumed anew. That these are grave questions, no one, I think, will doubt. That they lie within a narrow compass, and that the difficulty of their solution is not commensurate with their magnitude, it will now be my endeavor to demonstrate.

The portions of the Constitution which the defendants attack read as follows:

"ARTICLE XIII.

"*Revenue and Taxation.*

"SECTION 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership.

"SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi-public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected

thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof."

The statute of the State which is assailed is § 3664 of the Political Code.

In order to understand the character of the attack upon this section, it is necessary to observe, at the outset, that § 9 of Art. XIII of the Constitution provides for the election and organization of a State Board of Equalization. To this Board is confided the duty of assessing the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in the State. All other property is assessed by the local Assessors of each county. The State Board of Equalization has its office at the State Capital; and § 3692 of the Political Code provides that they are "to hold regular meetings at the State Capitol on the second Monday in each month, and such special meetings as the Chairman may direct."

Now, § 3664, against which the defendant's attack is directed, provides as follows:

POLITICAL CODE OF CALIFORNIA AS AMENDED IN 1880.

"SEC. 3664. On or before the first Monday in May in each year the State Board of Equalization shall assess the franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county. The President, Secretary, Cashier, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall furnish said Board, on or before the first Monday of April, in each year, a statement, signed and sworn to by one of such officers, showing in detail for the year ending on the first Monday in March, in such year:

"(*a.*) The whole number of miles of railway owned, operated, or leased in the State by such corporation, making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

"(*b.*) Also a detailed statement of the number and value thereof, of engines, passenger, mail, express, baggage, freight, and other cars, or property used in operating or repairing such railway in this State, and on railways which are parts of lines extending beyond the limits of this State. The returns shall show the actual amount of rolling stock in use

on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may in writing require.

"If such officer or officers so designated shall fail to make and furnish said statement, said Board of Equalization shall fix the value and proceed to assess the property of the corporations so failing; the valuation so fixed by them shall be final and conclusive. The said property shall be assessed at its actual value. Assessment shall be made upon the entire railway within the State, and shall include the right of way, roadbed, track, bridges, culverts, and rolling stock. The depots, station grounds, shops, buildings, and gravel beds shall be assessed by the Assessor of the county where situated, as other property. On or before the fifteenth day of May, in each year, said Board shall transmit to the County Assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within this State. Said statement shall be entered on the assessment roll of the county."

The validity of these provisions of the Constitution and Code has been fully established, so far as the State is concerned, by the decision of the Supreme Court of California, in *Central Pacific Railroad Company* vs. *The State Board of Equalization*, 60 Cal. 35. Upon well established principles, that decision is binding upon this Court as to any right claimed under the State merely. As to rights claimed under the Constitution of the United States, that decision has, of course, no authority here. Still, it narrows the field of inquiry to the single question: Do these provisions of the Constitution and Code of California contravene the Federal Constitution?

The defendants claim that they do, upon three grounds. Their contention is as follows:

1. The defendant is a Federal corporation. Its franchise

is derived from the Federal Government. It is not, therefore, subject to State taxation. And, since, upon the face of the assessment on which the plaintiff relies, the whole property of the corporation is assessed in gross and the value set upon the franchise cannot be determined, or separately ascertained, it follows that the whole assessment fails, and the tax cannot be collected.

2. Neither the Constitution of the State, nor its Code, provides for giving the defendants notice of the assessment of their property, nor opportunity to be heard therein. Therefore, they contravene that part of the Fourteenth Amendment which provides that no person shall be deprived of property without due process of law.

3. The Constitution, in declaring that a mortgage shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, in the case of private property but not in the case of property of a railroad, or other *quasi*-public corporation, and in declaring further that, in the case of private property, the amount assessed to the owner shall be the value of the property, less the value of the mortgage interest, but in the case of railroad and other *quasi*-public corporations the whole value of the property shall be assessed without any deduction for the mortgage interest, violates that portion of the Fourteenth Amendment which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

This, I believe, is the statement of defendants' positions in their logical order, and in that order I shall now examine them:

I. The first contention is met and rejected by the opinion of Mr. Justice Field, delivered in this case in the Circuit Court.

I cannot hope to add anything to the reasoning of the learned Justice.

II. To the second contention, relating to notice and opportunity to be heard in the assessment, the late decision of this Court in the Kentucky tax case, affords, if I have read and understood it aright, a complete answer.

The return in both cases, showing the property and values, is, in substance, the same. In both it is made by a designated officer of the road. In both it contains an enumeration of the property of the corporation and its value. In both it is under oath. In both the making and presenting the statement are, at once, a duty and a right of the company.

It has always been contended by the plaintiff that the presentation of this statement to the Board of Equalization, and the duty of the Board to receive and consider it, constituted a hearing of the company's case by the Assessors. This view, as I understand it, has now met with the approval of this Court. In the Kentucky case, the Court says:

"This return, made by the corporation, through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. It is laid by the auditor of public accounts before the Board of Railroad Commissioners, and constitutes the matter on which they are to act."

But, if this statement is not in itself a hearing, and the corporations are, under the Constitution, entitled to appear before the Board to be further heard, then it must be held that the statute, though silent on the subject, does not, by its silence, abridge or deny a right, which is otherwise fully guaranteed by the Constitution. In other words, if the Constitution secures to the taxpayer the right to appear before the Board and be heard, then it is the duty of the Board to hear him, even though the statute, in enumerating the duties of the Board, does not specify this one among them. This view is, as I understand it, the law announced by this Court in the Kentucky tax case, in these words:

"If the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it. The Constitution and the statute will be construed together as one law."

If the taxpayer has thus guaranteed to him the right to be heard, all that is needed, to secure to him all he can demand

on the score of due process of law, is that he should have notice of the proceedings.

This notice the statute amply affords.

The statement made by the company is to be presented on or before the first Monday in April. It must, however, be presented after the first Monday in March, for, the statement is for the year ending on the first Monday in March. The Board cannot proceed to assess until after this statement is presented, or until the first Monday in April has passed, for, the law provides that, "if such officer or officers so designated shall fail to make and furnish said statement, said Board of Equalization shall fix the value and proceed to assess the property." Clearly, then, the Board cannot proceed until the statement is presented, or the time for its presentation has lapsed.

But, it is urged that the Board is not to meet and make the assessment on a day certain, but may make it at any time between the two given dates—the first Monday in April and the first Monday in May; and that, as they are not compelled to give the taxpayer notice of the particular moment, between those two dates, when they will make it, therefore, the taxpayer has no notice and opportunity to appear. But, the meetings of the Board are public. They are held at the State Capitol. If the company has failed to present its statement, it has forfeited its right to be heard, and it is immaterial at what particular point of time action is taken in the case. If, on the other hand, it has presented its statement, then it has submitted its case to the Board for action. If it desires further hearing, it is its business to inform itself, at the office of the Board, at what time its case will be taken up, and at what time it will suit the convenience of the Board to hear it. It stands in the position of a defendant in Court who has presented and filed his answer. If he desires to be heard, when his case comes up, it is his business to inform himself as to when the Court, in the discharge of its duties, will take it up. It is yet to learn that, when a litigant has appeared in Court and filed his pleadings, it is not his duty to ascertain at what particular term, or day of the term, his cause will come up for hearing. It is yet to learn that, after an appeal has been

taken to this Court, for instance, the Court must, at the risk of denying the appellant due process of law, notify him of the exact day that his appeal will be heard. Of the condition of the calendar, the meetings and adjournment of the Court, and the proceedings in Court in his case, the appellant must, at his peril, keep himself posted.

III. The third ground of contention is, that our Constitution denies the defendants the equal protection of the laws, in that, whilst it permits the deduction of the value of the mortgage interest in the assessment of private property, such deduction is inhibited in the assessment of the property of railroad and other *quasi*-public corporations.

In defending the provisions of our Constitution, permit me, in the first place, to reply to an attack made upon it, which, if tenable, would place the organic law of California in a position ridiculous and absurd in the extreme.

The learned Circuit Court, in examining the Constitution, finds it, according to its reading, to declare, in terms, that a mortgage is made, in all cases, for purposes of taxation, an interest in the property assessed; that this interest which, by the construction of the Court, is declared in all cases to belong to the mortgagee, must, nevertheless, in the case of railroad and other quasi-public corporations, be assessed to the mortgagor.

That I may state this position aright, I must beg leave to refer to the record. There, Mr. Justice Field, at pp. 88, 89, 90, and 99 says:

"It [the Constitution] also declares that a mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. And that, except as to railroad and other quasi-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof. * * * A mortgage, as seen by the provisions of the Constitution quoted above, is deemed and treated for the purposes of assessment and taxation as an interest in the property affected. * * * By the Constitution, a mortgage for

the purpose of assessment and taxation operates in like manner to transfer the mortgagor's interest to the extent represented by the amount secured. * * * If, by a mortgage on the property of railroad or quasi-public corporations, a taxable interest in such property is transferred by the corporation to another, or the whole interest is vested in him, the holder of such interest is exempted from taxation for it, and the corporation is assessed and taxed for it notwithstanding the transfer. * * * On what principle, or by what species of reasoning, a tax upon property can be upheld and assessed against a party, be the party a natural or an artificial person, when the taxable interest in it had, at the time of the levy of the tax, been transferred to another, I am at a loss to understand. * * * That the proceedings, by which the taxes claimed in these several actions were levied against the railroad companies on taxable interests with which they had parted was not due process of law, seems to me so obviously true as to require no further illustration. It goes almost without saying; and any additional argument would rather tend to obscure a truth which should be evident upon the simple statement."

The learned Justice concludes this charge against the Constitution by saying:

"This position of the case was suggested to counsel on more than one occasion during the argument, and no answer was made to it. To every other position an answer was attempted, but to this none; and, as we think, for the best of reasons, because none was possible."

This position of the learned Circuit Court has never been taken by any of the numerous and eminent counsel for the defendant who have argued this cause here and elsewhere, and, I think, for the simple reason that the argument is based upon an obvious misreading and palpable misconstruction of the language criticised. This misreading and misconstruction was pointed out in the Court below by counsel for the plaintiff, who said:

"Now, I think that the reading of that would be very much improved by a change in the punctuation. As it stands, it reads: 'A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby.' There is a full stop there. We think it ought not to be there. It ought to read: 'Shall be deemed and treated as an interest in the property affected

thereby, except as to railroad and other quasi-public corporations.'"

Counsel for defendant here are forced to abandon the position taken by the Circuit Court by admitting that its reading of the Constitution is wrong, and the reading of the plaintiff right. Say counsel in the brief here at p. 30:

"There is an obvious mistake in punctuation in the language I am about to quote. The period which is placed after the word 'thereby' should have been placed after the word 'corporations' in the next line. * * * In quoting the passage in question, I shall, therefore, put the period after the word 'corporations.' It then reads as follows: 'A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, *except as to railroad and other quasi-public corporations.*'"

Indeed, long before the argument of this cause at Circuit, the Supreme Court of California had construed this section of the Constitution and declared it to mean what the counsel for plaintiff contended for in the Court below, and what the counsel for defendant admit here. In the case of *Central Pacific Railroad* vs. *State Board*, 60 Cal. 35, 59, the Supreme Court had said: "Reading the whole section, it seems very plain that as to mortgages, deeds of trust, contracts, or other obligations secured upon the property of railroad and other quasi-public corporations, they should not be deemed and treated as an interest in the property affected by them 'for the purposes of taxation.'"

Instead, therefore, of holding the Constitution to say that a mortgage is, in every case, an interest in the property, it must be held to say that, in the case of railroad and other quasi-public corporations, it is not such an interest. Thus read, the Constitution, whatever its other imperfections, is readily absolved from the absurdity of deliberately declaring, in one and the same breath, that certain property belongs to A, but shall, nevertheless, be assessed to B.

But, it is next urged, that even if a mortgage be considered in the light of a mere charge upon the property affected, still, as the Constitution makes it an element of deduction in the

valuation of private property, and not in that of railroad property, there is here a plain and injurious discrimination against railroad property. The learned Circuit Justice states this position very clearly, at p. 92 of the record, as follows:

"If any element which is taken into consideration in the valuation of the property of one party be omitted in the valuation of the property of another, a discrimination is made against one and in favor of the other, which destroys the uniformity so essential to all just and equal taxation. Such an element exists where in the assessment of property subject to a mortgage, the value of the mortgage is deducted if the property be owned by a natural person, and is not deducted if owned by a railroad corporation. And the Constitution of the State declares that, in the ascertainment of values as the basis of taxation, such deduction shall be allowed in the one case and denied in the other."

Before undertaking the defense of our Constitution upon this point, permit me first to observe, that, if to take an element into consideration in the valuation of certain property and to omit it in that of other property, or if, in valuing property, to permit a deduction for the owner's debts, in certain cases, and to forbid it in others, "destroys the uniformity so essential to all just taxation," and is a sin against the Federal Constitution, California is not the only State which has offended.

The Code of Alabama of 1876, Section 362, Sub. 8, provides that "all money loaned, and solvent credits, or credits of value," shall be assessed. Section 365, Sub. 3, speaks of assessing "lien notes, mortgage notes, and other notes." Under Section 372, in the case of building and loan associations, the notes and mortgages of the stockholders or members of such associations, given to the associations for purchase money or advances of stock made at the distribution of the funds thereof, are exempt from taxation. Yet, the Constitution of the State provides that all property shall be assessed in exact proportion to its value, and the property of corporations at the same rate. Const., Art. II, § 1, § 6.

In Nebraska, the taxpayer is assessed for credits, but is allowed "to deduct from the gross amount of credits the amount of all *bona fide* debts owing by such person, company,

or corporation to any other person, company, or corporation * * * *provided*, that nothing in this section shall be so construed as to apply to any bank company, or corporation exercising banking powers or privileges." [Comp. St. 1881. *Revenue*, § 27, p. 404.]

Precisely the same rule prevails in Illinois. [Revised St. 1880, p. 873, § 27.]

In Pennsylvania, "mortgages, money owing by solvent debtors * * * owned or possessed by any person or persons whatsoever, *except* * * * obligations given to banks for money loaned," shall be taxed. Mortgages are exempt from all taxation except for State purposes, "provided, the provisions of this Act shall not apply to building and loan associations." [Laws of 1881, p. 99, § 1.]

Further: "All mortgages * * * shall be exempt from all taxation except for State purposes, * * * provided that nothing in this Act shall be construed to apply to mortgages * * * given by *corporations;* provided, that this Act shall only apply to the Counties of Berks, Schuylkill, etc." [Brightly's Purdon's Dig., 1369, § 83.]

The basis of the whole argument of the learned Circuit Court, upon this question of discrimination, lies in the assumption that, in the levy of a property tax, the State is bound to treat railroad property precisely like other or private property, and is permitted to make no discrimination whatever between them.

If this be so, it is safe to say that there is hardly a State in this Union whose revenue system is not in danger of overthrow. There is hardly a State which does not apply to railroad property a special mode, either of valuation, assessment, or taxation.

In Alabama, the law fixes the *minimum* valuation of railroad property—that *minimum* being a sum which, if placed out at interest, at eight per cent per annum, would yield the yearly net earnings of the road. [Code, § 383.]

This system of valuation is applied to railroad property alone. No such *minimum* value, or mode of valuation, is applicable to other property.

In Arkansas, "the roadbed, water and wood stations,

stations, and such other realty as is necessary to the daily running operations of the road, shall be treated and estimated as personal property." [Gantt Dig. 5099.]

This treatment of realty as personal property is applied to the realty of railroads alone. No such rule obtains as to other realty.

In Connecticut, a railroad pays, in lieu of all other taxes, on its franchise, funded and floating debt, and property, a tax of one per cent on the market value of its stock and funded and floating debt, after deducting from such valuation the amount of cash on hand, and from the amount required to be paid, the amount paid for taxes on its real estate not used for railroad purposes. The statute declares that the valuation so made shall be the measure of the value of such railroad, its rights, franchises, and property in the State. [Gen'l St. 1875, p. 717, § 46.]

Note, here, that this mode, both of assessment and taxation, is special, and applicable to railroad property alone. The mode of valuing the property is special. The tax imposed—one per cent—may be more or less than that imposed upon other property in the State. If more, then, according to defendant's theory, the company might complain; if less, the other taxpayers might feel aggrieved.

In Delaware, a special tax is imposed upon incorporated railroads, of ten per cent of their annual income; besides $100 for every engine, $25 for each passenger car, $10 for each freight car, and one half of one per cent upon the cash value of every share of stock. One particular road, the Philadelphia, Wilmington and Baltimore Railroad, is allowed to pay a gross sum of $27,000 per annum in lieu of all taxes, with certain exceptions. [Codes 1874, p. 41.]

In Kentucky, it is provided that railroads shall be assessed for taxation at the rate of $20,000 for broad gauge roads, and $10,000 for narrow gauge. They are to pay upon this valuation "the same rate of tax on the assessment as is levied by law on real estate." [Genl. St. 1883, p. 744.]

In Maine, under the Act of 1880, ch. 249, the Governor and Council are to appraise the several railroads in the State, with their franchises, rolling stock, and fixtures, at their cash

value, and upon this valuation to levy a tax of one per centum. The Constitution requires all taxes upon real and personal estate to be apportioned and assessed equally, according to its value.

In Michigan, the Constitution expressly declares that the Legislature may provide for the collection of specific taxes from railroad and other corporations. [Art. 14, § 10.]

In Mississippi, the Constitution provides that taxation shall be equal and uniform—all property shall be taxed in proportion to its value. [Const., Art. 13, § 20.]

The value of railroad property is ascertained by a Board in a special way; but, certain enumerated companies are allowed to pay a gross tax of so much per mile, "and," says the Code, "the payment shall be in full of all State and county taxes." [Revised Code, 1880, § 489, 597, 599, 607, 608.]

In Nebraska railroad property is assessed by a Board, and, says the statute, "such property shall, for the purpose of taxation, be deemed personal property." [Com. St. 1881, p. 407, § 39, 40.]

In New Hampshire railroads are taxed specially; but railroads "the construction of which was commenced since the fifteenth day of September, 1868, or hereafter constructed in this State," are exempt from taxation for ten years. [General Laws, 1878, pp. 159, 160.]

In Ohio a State Board assesses of railroads "all the personal property, which shall be held to include roadbed, water and wood stations, and such other realty as is necessary to the daily running operations of the road." [Revised Stat. 1880, § 2770.]

In South Carolina the law provides that "the roadbed, right of way, station buildings, toll houses, structures, and real estate owned and necessarily used by any railroad * * * company in the prosecution of its business, shall, if the company be organized in this State, be treated as personal property." [General St. 1882, § 179, 180.]

In Virginia the Constitution provides that "taxation shall be equal and uniform; all property shall be taxed in proportion to its value." [Const. of 1870, Art. 10, § 1.] Yet, a special tax of fifty cents on $100 is laid "on the real and personal

property of every railroad and canal company." [Code of 1873, p. 349, § 8.]

Now, if these various systems be not all wrong, what, in practice, becomes of "the uniformity" which, but a moment ago, we were told was so "essential to all just and equal taxation?" Here is no uniformity, but the greatest possible diversity. And the special mode of valuation, assessment, and taxation—or discrimination, if you please—if permissible, may be carried to any length. If it is proper for Connecticut and Maine to impose, by direct legislative enactment, a tax of one per cent on the value of railroad property, equally lawful is it to impose a tax of two, or five, or ten per cent. If the power exists, it is a sovereign power, and is limited only by the wisdom and discretion of the sovereign. If it is lawful for Kentucky to fix, by direct legislative enactment, a valuation of $20,000 per mile upon every railroad, equally lawful is it to fix a valuation of $30,000, or $50,000, or $100,000. If it is lawful for Alabama to say that the *minimum* value of a railroad shall be a sum which would produce its net income upon a basis of interest of eight per cent, equally lawful is it to say that the calculation shall be made upon the basis of interest at five, or three, or one, or one tenth of one per cent. If it is lawful for New Hampshire to exempt certain railroads from taxation for ten years, equally lawful is it to exempt all railroads for the same period, or forever. If it is lawful for Virginia to impose, by direct legislative act, a special tax of fifty cents on the $100 of railroad property, equally lawful is it to impose a tax of $1, or $2, or $5, or $10 on the hundred.

These various revenue systems of the States demonstrate that, in practice, at least, the rule of uniformity, which, it is stoutly maintained here, requires that railroad property shall not be burdened differently from other property, is seldom observed. Indeed, this course of legislation fully illustrates the language of this Court, speaking through Mr. Justice Field in the Delaware Railroad Tax Cases, 18 Wall., 231, that "the State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or the separate corporate property. And the manner in which the value shall be assessed, and

the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

It may be answered that these various revenue systems are all unconstitutional. It will, I think, require no little boldness to assert that so many States have legislated in ignorance, or in defiance, of the principles of the Federal Constitution or their own organic law of equality. At all events, the universality of the practice of discrimination suggests, at least, some common ground of action, some common principle of legislation. That principle is, I conceive, the right of classification of property in matters of taxation. The revenue systems of the various States show that it has been the practice to classify railroad property—to make of it a class apart—and to apply to it special modes of valuation, assessment, and taxation, and to impose upon it special burdens, not applied to and not imposed upon any other kind of property.

This right of classification I do not understand to be denied by the defendants; and, if it were, it is universally recognized and has been expressly sanctioned by this Court in the Kentucky tax case. Says the Court there:

"There is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the Legislature has seen fit to impose."

What is there then to inhibit the State of California from classifying the property of railroad and other *quasi*-public corporations, and applying to it a system of valuation and taxation different from that applicable to private property? The fact that such property is affected with a public use affixes to it, at once, a badge to distinguish it from other property. It is, by its very nature, made to enjoy special privileges and to bear certain special burdens not enjoyed or

borne by other property. The use of property dedicated to a public use is subject to be regulated by the public—a burden not imposed upon strictly private property. The enjoyment of such property carries with it the right of eminent domain, which is not accorded to the enjoyment of strictly private property. As an agency of the sovereign, it enjoys certain sovereign attributes and is subjected to a certain corresponding sovereign control. And the fact that it is an agency of the sovereign, an instrument of State, might well, in the wisdom of the sovereign, lead to its absolute exemption from any other public burdens than such as necessarily attach to it. But, if such an exemption would be no discrimination of which other property could complain, so, an unfavorable discrimination by which it is burdened is not a ground upon which it can complain. But grant the power to make a discrimination, and the question of advantage or disadvantage becomes at once immaterial.

Certain objections are made, however, to the classification contained in our Constitution, which I purpose, now, briefly to consider.

It is urged, in the first place, that, whilst the Constitution might have classified—and properly classified—the property essential to the operation of the railroad, yet, if the classification extends to all the property of the railroad company—as well that which is essential to the operation of the road as that which is not—then the classification is vicious and void. This claim is put forward on the strength of the fact that this defendant owns certain lands, which are said to be farming and grazing lands, not connected with the operation of its railroad.

I answer, that the Southern Pacific Railroad Company was never organized to go into the business of farming and grazing; that, when the Constitution was framed, its authors could not be supposed to know that the Southern Pacific Railroad Company had transcended the limits of its charter to go into the more seductive paths of agricultural and pastoral pursuits. The only legitimate business of the corporation was and is to operate a railroad. To that all its property

and all its corporate actions must be made subservient. If the company owns an office in the City of San Francisco in which its books are kept, its tickets sold, its funds received or disbursed, its general business centered and distributed, that office, though real property, removed from any actual line of railroad, is yet, in every sense, railroad property, as essential to the proper conduct of the business of the company as is the rail upon the roadbed, the signal upon the switch, or the roundhouse at the station.

By the very Act of its incorporation—the statute of 1861—the company has no power to hold real property, other than such as is "necessary for the construction, completion, and maintenance of such railroad," and, if it may take voluntary grants of real estate, still these must be confined to such as are made "to aid and encourage the construction, maintenance, and accommodation of such railroad." The whole of its property is thus made to subserve the road. Its real estate is but an adjunct to the road, a help, an aid—which the corporation is allowed to hold only because it is an aid to the road. It, like the road, is dedicated to and subserves a public use.

In the Kentucky tax case, the special mode of taxation applicable to railroad corporations, was justified and upheld by this Court upon the ground of classification of property; yet, we find that the classification was not confined to property actually used in the operation of the road. The words of classification, as with us, comprised the whole property of the corporation. Said the statute:

"The President or other chief officer of each railroad company * * * shall * * * return * * * the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, and incorporate town therein, together with the average value per mile thereof, * * * including engines, and cars, and a list of the depot grounds and improvements, *and other real estate of the said company*, and the value thereof."

And the complaint was brought to recover the taxes assessed on "defendant's line of railroad lying in this State *

* * together with the rolling stock, engines, cars, depot grounds, improvements, *and other real estate.*"

But, grant that the grazing and farming lands of the company could not properly be classified with and as strictly railroad property, what follows? Simply this, that, in classifying railroad property, the Constitution uses descriptive words, which, being too broad, include, with property which is strictly classifiable, some property which can not properly be classified with it. But, does it follow, therefore, that the classification must utterly fail? Does it follow that the purpose of the framers of the Constitution must be wholly frustrated, because, in doing what they legitimately could do, they coupled with it an attempt to do what they legitimately could not do? Must such a result follow, when the bounds between the exercise of legitimate power and illegitimate assumption are as easily defined as they are here? Let it be observed and remembered that the two classes of property of railroad companies—the railroad proper, which it is admitted can be classified, and these outside lands, which it is claimed can not be classified—are, by the Constitution, subjected to two absolutely distinct systems of assessment. Each is assessed separately, at different times and by different officials. The railroad proper is assessed by the State Board of Equalization, and its description and value is set down in their books. The outside property is assessed by the local Assessors, and its description and value is set down in their books. Thus, the two classes of property are always kept separate.

Now, for the taxes upon these outside lands, no claim is made in this action. On the contrary, it is found as a fact, that upon these lands, whose presence in the classification is, it is claimed, the only element which renders the whole classification void, the taxes have been fully paid. [See the twenty-sixth finding, record, pp. 72, 73.] The only tax involved here is a tax upon the road—property which, it is not denied, is properly classified.

Why, then, shall not the classification as to the road hold good? The part of the classification which is claimed to be bad can be readily eliminated—nay, has already been elim-

inated by the action of the defendants themselves. Why, then, shall not the classification stand as to the balance, which is confessedly good? Why shall the defendants be permitted to escape taxation upon the good part, when they have already taken the bad out of the controversy by voluntarily paying the taxes upon it?

A striking and pertinent illustration and application of the proposition that I am now trying to establish is found in the case of the State Freight Tax, Pennsylvania case. There, the State of Pennsylvania had passed a law imposing an indiscriminate tax upon all the freight carried by railways in Pennsylvania. Now, the State could constitutionally impose the tax upon freight received for carriage wholly within the State, but not upon freight received for carriage to or from any part outside the State. Did it follow that the whole tax was void? No; the good was separated from the bad.

Permit me to read the epitome of the case from this opinion of Mr. Justice Miller in *Stanley* vs. *The Supervisors*, in 105 U. S., because it sets forth clearly and distinctly the point which I am now addressing myself to. The Court said here:

"The case of the State Freight Tax, 15 Wallace, 232, arose out of a statute of Pennsylvania which attempted to impose a tax on commerce forbidden by the Constitution of the United States. The Act imposed a tax upon every ton of freight carried by every railroad company, steamboat company, and canal company, doing business within the State. The railroad companies who contested the tax presented a statement, which separated the freight transported by them between points solely within the State, and limited to such destination, and that which was received from or carried beyond those limits. This Court held the latter to be void as a tax on interstate commerce, and did not declare the whole tax or the whole statute void. It said: *It is not the purpose of the law, but its effect, which we are now considering*, nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate commerce. The conclusion of the whole is that, in our opinion, the Act of the Legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State

and brought into it, is unconstitutional and void. The same language is repeated in *Erie Railway Company* vs. *Pennsylvania*, decided at the same time. Both cases were remanded to the State Court for further proceedings, in conformity with the opinion, which could only mean to enforce the tax on transportation limited to the State, and not on interstate commerce. This is a clear case of distinguishing between the articles protected by the Constitution of the United States and those which were not, *though nothing in the language of the statute authorized any such distinction.*"

I submit that this is a parallel case to the one at bar. There, the State imposed an indiscriminate tax, part good, part bad. The taxpayer came into Court, and showed what part was good and what part bad—what part the State could impose and what not. The Supreme Court said that, although the tax was a unit, yet, as the good could be readily segregated from the bad, they would leave the good to stand, and simply eliminate the bad. So, I say here, if we grant that the inclusion of the farming and grazing lands of the company, in the class of railroad property, is not permissible, still, as the strictly railroad property is properly classified, the classification made by the law will stand as to the latter, and the former alone will be excluded.

But, it is further urged that the Constitution shows upon its face that the classification is of persons and not of property, because the language used does not, in terms, speak of railroad property, but of property of railroad corporations.

The Constitutional Convention knew that, as a matter of fact, railroad property is now universally owned by railroad corporations. They knew, what was an unquestionable fact, and what this record does not negative, but, on the contrary, inferentially, at least, establishes, that at the time they wrote there was no railroad property in California which was not owned by a railroad corporation. It is true that certain statutes of the State were given in evidence here, granting to certain individuals railroad franchises; but the case shows that such roads have never been built—never have had any existence as property. The phrase, then, "the property of railroad corporations," was, at the time it was used in California, the equivalent of "all railroad property." It is true

that, since the Constitution was adopted, an insignificant local road of 26¼ miles in length has, under foreclosure proceedings, passed into the hands of a private individual. But, it is submitted, that this unusual, and, no doubt, merely temporary mode of ownership, does not destroy a classification which, when made, was made by words which then aptly described, and in the ordinary course of things are well calculated to describe, the property intended to be classified. I submit upon this question two propositions: First, if in making a classification, the law-maker uses language sufficient, according to the ordinary course of things, to describe the property intended, the classification does not fail from the fact that some insignificant part of the property intended is not covered by the descriptive words used; and, secondly, if, in making a classification, descriptive words are used which are at the time sufficient to include and cover the whole of the property classified, the classification is not avoided and annulled, because, subsequently, some insignificant portion of the property is, by an unusual and extraordinary course of dealing, withdrawn from the scope of the descriptive words.

In the Kentucky tax case, this Court, as already stated, upheld the system of taxation on the ground of classification of railroad property; yet, the descriptive words, by which the classification was made, were not "railroad property," but "the property of railroad companies;" and the whole tenor of the statute shows that the system presented could only be applied to the property of *corporations* owning railroads. The very title of the statute is: "An Act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation and for taxing the same." The first section provides for a report, which can only be made by "the President or chief officer of each *railroad company or other corporation* owning a railroad," while the fourth provides for a notice to be given to "each railroad *company* of the amount of its assessment."

It is perfectly apparent that this Court understood the words "railroad property" and "property of railroad companies," to mean one and the same thing; for, they declare

the Act to have classified railroad property and say: "in the legislation of Kentucky on the subject, railroad property is classed by itself," when, as I have shown, the Act throughout speaks of the property of railroad corporations, and never in terms of "railroad property." Now, I ask, would the Court have listened to the argument that there was no classification, because the Act did not speak of property, but of particular owners of property? Could it have been successfully urged here that there was no classification, because private persons, as well as corporations, might own a railroad? Would the Court have declared the classification void, though it had been shown that, after the passsage of the statute, some private person had bought an insignificant portion of a Kentucky railroad?

The truth is that the words "railroad property" and "property of railroad companies," are universally understood to mean one and the same thing.

If these views are correct, they dispose of this branch of the case, for, if it is once admitted that railroad property is classifiable, and that our Constitution has classified it, then, any system of taxation applied to it, however discriminatory, does not fall within the inhibition of the Fourteenth Amendment.

There is another view of this subject of classification which, to my mind, is no less conclusive. The same law which provides for the assessment of mortgages, may classify them according to their distinctive characteristics; and may, according to the wisdom of the legislators, exempt a certain class altogether from taxation. This is what has been done here.

The history of the Constitution of 1879 shows that the provisions regarding the taxation of mortgages arose from a public desire to subject the lenders of money to the burdens of taxation. This was accomplished by declaring that a mortgage should be deemed and treated as an interest in the property affected, and "assessed and taxed to the owner thereof," and, in order to avoid double taxation, that the residue only of the property—the value of the property less the value of the security—should be assessed to the mort-

gagor. When the Convention had reached this point, they were reminded that there were mortgages made by railroad and other quasi-public corporations of the State, to secure large amounts of bonds owned in all parts of the world.

The difficulties of making the general provisions of the Constitution applicable to the mortgages of these corporations, were, at once, apparent and insuperable. The mortgages of the Central Pacific Company, for instance, covered property in the State and outside of the State. Those of the Southern Pacific Company, besides the railway, depots, and grounds, covered a large quantity of personal property, such as "machinery, weighing scales, and tools." It affected a land grant of eleven million acres of land—a land grant partly earned and partly unearned, partly patented and partly unpatented, the title to a portion of which only had vested in the company, the rest remaining in the Government—a land grant continually shifting in its proportions, increasing, on one side, by new patents received from the Government, and decreasing, on the other, by sales made by the company.

When the Convention came to face the problem of apportioning the value of these mortgages among the various counties of the State; how it should be deducted from the various parcels of the companies' property; how much of it was to be borne by the main trunk, how much by the branch roads, how much by the depot grounds and yards, how much by outlying lands, how much by the personal property; when they added to these difficulties the fact that the mortgages covered bonds that might issue in the future, or might, at any time, be redeemed, and that it was impossible for any Assessor to ascertain how many bonds were actually outstanding, or who or where were the owners of them; when they added the fact that the mortgages upon the Central Pacific Railroad covered property partly in the State and partly out of the State, and that it was extremely difficult, if not impossible, to ascertain what relative proportion of the security was in the State and what out; when, I say, the framers of the Constitution were brought face to face with these ob-

stacles, they readily perceived that the general scheme of taxation could not apply to the mortgages of these railroad companies.

In seeking a way out of these difficulties, in endeavoring to devise a plan which would, at once, carry out the wishes of the people as to taxing mortgages, without producing double taxation, and would, still, be applicable to the immense property of these railroad corporations, the Convention had its attention called to the fact—a fact of public notoriety, spread upon the records of every county in the State—that the mortgages given by these companies contained a covenant that the mortgagors, themselves, should pay all taxes imposed upon the property mortgaged, and discharge every lien or burden thereon that might have priority of the mortgage. In this covenant was found a ready solution of the difficulty. In the light of its obligations, it was perfectly apparent that the assessing of the mortgage separately to the mortgagee and the residuary interest merely to the mortgagor would be an idle ceremony, and would accomplish none of the objects which the Convention had in view. It would not have the effect of imposing a tax upon the mortgagee, since, by virtue of the covenant, he could always make the mortgagor pay the tax. And, as to the companies, it could not, for the same reason, lighten their burden of taxation. Since they were under obligation to pay the whole tax—as well that imposed upon the interest covered by the mortgage as that upon the residuary interest—it could be productive of no conceivable benefit to them to have these two interests assessed separately, and of no conceivable injury to have them assessed in lump. The result, in the end, upon the amount of taxes they should pay, would be precisely the same. In both cases, their burden of taxation would be precisely the same. The Convention, therefore, resolved that the mortgages of these companies should not be assessed; that their property should be assessed as a unit, whilst the property of other persons was assessed in fractions—part to the mortgagor, part to the mortgagee.

Thus, the Constitution classified mortgages for the purposes of taxation. Subjecting one class to taxation and exempting

the other. Subjecting to taxation that class in which the mortgagee might be bound to pay the tax, and exempting from taxation that class in which the mortgagee was, by the very terms of the mortgage, placed beyond the reach of taxation. The scope and object of their labors will be at once apparent if, according to ancient practice, we place together in the shape of a preamble, the law and the reason of the law, thus:

"Whereas, it is desirable that the lenders of money upon mortgages should pay taxes upon the value of their mortgages, therefore, be it enacted, that a mortgage shall be deemed and treated, for purposes of assessment, as an interest in the property affected thereby, and the value thereof shall be assessed to the mortgagee, and the value of the residue, only, shall be assessed to the owner of the property. But, whereas, the mortgages of railroad and other quasi-public corporations contain a covenant by which the mortgagor is obligated to pay the tax upon the whole property mortgaged; and, whereas, in view of this covenant, it would be idle to assess the mortgage interest to the mortgagee, for, that interest being an interest in the property mortgaged, the mortgagor is bound, by the terms of the covenant, to pay the taxes thereon; and, whereas, since the mortgagor is bound to pay the taxes upon the whole property, nothing would be accomplished in the end, by assessing any part of it to the mortgagee; therefore, be it enacted, that, in the case of mortgages of railroad and other quasi-public corporations, the whole property shall be assessed to the mortgagor, and the mortgage shall not be assessed at all."

Thus were railroad mortgages classified. For these reasons they were withdrawn from the system of taxation applicable to ordinary mortgages. It is submitted, that the reasons are proper and the classification valid.

The answer given by the defendant to these views is, that the covenant in the mortgage has not the meaning which I ascribe to it. In other words, they affirm that, under the Constitution and laws of California, if a mortgage were assessed to the mortgagee, the mortgagor would not be obligated to pay the tax thereon, though the mortgage contained this covenant.

This is a question of the effect of the Constitution and laws of California, and is expressly decided against the contention of the defendant by the decision of the Supreme Court of that

State, in *Beckman* vs. *Skaggs*, 59 Cal. That decision settles the law of California precisely as I contend it to be.

Upon the ground of classification, then—whether of railroad property or of mortgages—the system of taxation applied in California to railroads is, it is submitted, entirely legitimate and constitutional.

The case of the plaintiff in error, so far as any Federal question is concerned, might well rest here. But, it may not be amiss to say a few words as to the positions assumed by the defendants. The shield behind which they attack the Constitution and laws of California is the Fourteenth Amendment. They argue that that amendment guarantees to every person within the jurisdiction of the State the equal protection of the laws; that a corporation is a person; therefore, it must receive the same protection as is accorded to all other persons, in like circumstances.

The special argument advanced is, that if an individual owns property, and a corporation owns precisely the same kind of property, the law protects them both equally in the use and enjoyment of that property; and for the protection it affords the corporation, the Government can demand no greater or different return in the shape of taxes than it demands from the individual.

That argument I beg leave to controvert. I venture to affirm in broad terms that the general practice, at least of the States of the Union, shows that a State may demand taxes from a corporation, when, under the same circumstances, it asks none from an individual.

To illustrate: The Constitution of California provides for a tax on incomes. No one denies the power to impose and collect such a tax. Income may be either the total returns which a person receives from property during a given period, or the net revenue after deducting all expenses incurred in the care or management of the property. In either case, the rule of equality contended for by the defendant would compel the State, if it taxed the income of any corporation derived from given property or business, to tax the income of all individuals derived from the same kind of property or business; for, if both the corporation and the individual are enti-

tled to the equal protection of the law, the State cannot tax the corporation, while exempting the individual as to things which are essentially the same—income from the same sources.

But the taxing system of many of the States shows that the practice has been the other way.

In Delaware, it is provided "that all railroad and canal companies incorporated under the laws of the State," etc., shall pay "a tax of ten per centum upon the net earnings or income received * * * during the preceding year." [Revised Codes, 1874, p. 41.]

No provision is made for taxing incomes derived from railroads or canals owned by private persons.

In Massachusetts, "the Tax Commissioner shall * * * ascertain and determine the net profits or gains of each *corporation* from which a report is required * * * and shall assess a tax of four per cent upon the amount thereof." [Pub. Stat., 1882, p. 140, §45.]

In North Carolina, express and telegraph *companies* pay two per cent on their gross earnings. [Battles' Revision, 1873, p. 783, §93.]

In Pennsylvania each railroad, canal, and transportation *company* "shall pay a tax of three fourths of one per cent upon the gross receipts of said company." [Brightly's Purdon's Dig., p. 1384, §161.]

In Rhode Island, telegraph and telephone companies pay one per cent of their gross receipts, "which sum shall be in lieu of all other taxes upon its lines and personal property." [Pub. Stat., p. 84, §10.]

In Tennessee, "each railroad company and every other *incorporated* company except charitable and religious, doing business in this State, shall pay into the treasury of the State six mills on the dollar on the amount of the net earnings of such railroad company," etc. [Stat. 1871, §553, Sub. 67.]

Thus it is apparent that, in not a few of the States, a tax is imposed upon the incomes of corporations, when, under the same circumstances, none is imposed on individuals.

It may be contended here—indeed it was so urged in the Court below—that, in the matter of the equal protection guaranteed to corporations by the Fourteenth Amendment, a dis-

tinction must be drawn between property and incomes; that, whilst no discriminating tax can be levied upon the property of the corporation, it may be so levied upon its income; that, whilst, though the income of the corporation and the individual be derived from the same property, you may discriminate between them, yet the property itself must be treated just alike. But, I submit, that if the State may legitimately lay a tax upon the income of a corporation, whilst it lays none upon that of the individual derived from the same property, so may it legitimately lay a tax upon the property itself of the corporation, whilst it imposes none upon that of the individual. If the rule of equality demands that the property be taxed alike, it clearly cannot permit the incomes from the property to be taxed differently. If the State may make one kind of discrimination, it clearly can the other. What a mockery of a law would that be which, whilst pretending to discharge the duty of equal protection to the farms of A and B, should lay a tax of ten per cent or fifty per cent upon the income which A derives from his farm and none upon that which B derives from his!

To my mind, the fallacy, if I may be permitted so to term it, of the argument, lies in the assumption that corporations are entitled to be governed by the same laws that are applicable to natural persons. This, it is said, results from the fact that corporations are persons, and that the last clause of the Fourteenth Amendment refers to all persons, without distinction.

The defendants have been at pains to show that corporations are persons, and that, being such, they are entitled to the protection of the Fourteenth Amendment. There was scarcely need of the array of learning and elaborate disquisition which has been displayed on this point. Of course, corporations are persons, and, of course, they are protected by the Fourteenth Amendment. No one, I presume, has ever questioned it. The question is: Does that amendment place corporations upon a footing of equality with individuals?

Blackstone says: "Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of Nature formed us; artificial are such as are

created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." [Book I, p. 123.]

This definition suggests, at once, what it would seem unnecessary to dwell upon, that, though a corporation is a person, it is not the same kind of person as a human being, and need not, of necessity—nay, in the very nature of things can not—enjoy all the rights of such or be governed by the same laws. When the law says: "Any person being of sound mind and of the age of discretion may make a will," or, "any person having arrived at the age of majority may marry," I presume the most ardent advocate of equality of protection would hardly contend that corporations must enjoy the right of testamentary disposition or of contracting matrimony.

The equality between persons spoken of in the Fourteenth Amendment obviously means equality between persons of the same nature or class, and not equality between persons whose very natures are absolutely dissimilar—equality between human beings, if the rights of natural persons are involved; equality between corporations of the same class, if the rights of artificial persons are involved. The whole history of the Fourteenth Amendment demonstrates beyond dispute that its whole scope and object was to establish equality between men—a possible result; and not to establish equality between natural and artificial beings—an unattainable result.

The evolution of the Fourteenth Amendment began with the first Civil Rights Bill, which provided that:

"All persons *born* in the United States * * * are hereby declared to be citizens of the United States, and such citizens of every race and color * * * shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sue, hold, and enjoy real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by WHITE citizens."

That this law was intended to establish equality between men in their individual capacity, and had no reference to equality between men and corporations, is too plain for argu-

ment. The law took the rights of a white citizen as the standard of measurement, and simply commanded that the rights of all other citizens, whatever their race or color, should be equal to his.

After the adoption of the Fourteenth Amendment, Congress passed the second Civil Rights Bill, by which they at once gave legislative interpretation and enforcement to the amendment. They provided that:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, *give evidence*, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to none other."

That this, again, was intended to establish equality between natural persons, is, to my mind, equally plain. The standard taken by the law is a white citizen and his rights and obligations. To this standard the law raises the rights and by it measures the obligations of all persons within the State or Territory. Could Congress have, by any possibility, meant to confer upon artificial persons the same rights in the respects enumerated as were enjoyed by white citizens? Could they, for instance, have meant that a corporation should have the same right to "give evidence" as a white citizen? And, as to making contracts, may not the State which creates corporations, impose certain limitations upon their right or power to make contracts? Because the right of a white citizen to make a contract extends to all things not forbidden by law, must the right of a corporation be coextensive with it? Under this leveling statute was it intended to abolish the right of a State to impose terms and limits upon its own creatures? Again, as to burdens: The statute says that the taxes, licenses, and exactions of every kind, and none other, which are demanded from white citizens, shall be demanded from all persons within the State or Territory. Here, again, the burden to which a white citizen is subjected is the standard of measurement. To justify a tax, license, or exaction, it must

first be shown that it is demanded from white citizens. If it is not, it cannot be demanded from any other person within the State. Was this meant to apply to corporations? Was it intended that corporations should be subjected to no tax, license, or exaction that was not imposed upon white citizens, "any law or statute * * * to the contrary notwithstanding?" It is certain that this law has never been so understood or interpreted by any State. And if it is now so to be interpreted, what, I ask, is to become of the vast mass of legislation in all the States by which taxes, licenses, and exactions are demanded from corporations where none whatever is demanded from white citizens? To take a single illustration: By a statute of Massachusetts every savings bank *incorporated* under the laws of the commonwealth pays a tax of one and one half per cent on its deposits. No such tax is imposed upon any individual, or white citizen. This Court has held that this was a tax on the corporation—the person. It said: "The subject-matter to be taxed is the corporation, and the average amount of deposits within the period named furnishes the basis of computing the amount." If the corporation is, under this law, to be subjected to such taxes as are imposed upon white citizens, *and none other*, how could this tax in Massachusetts be upheld?

That the Fourteenth Amendment was intended to secure equality between persons which, in the nature of things, were equal, and not between one class of persons and another class entirely dissimilar, seems so plain that the defendants themselves are, at times, compelled to admit it. As good a definition as I could desire of the meaning of the words "equal protection of the law," I find in the arguments formerly delivered here in the San Mateo case by the learned gentlemen opposite.

Mr. Sanderson there says: "I believe that the clause in relation to equal protection means the same thing as the plain and simple yet sublime words found in our Declaration of Independence, 'all men are created equal.' Not equal in physical or mental power, not equal in fortune or social position, but equal before the law." Mr. Edmunds, speaking, on the same occasion, of this amendment, said that it was a

"broad and catholic provision for universal security, resting upon citizenship as it regarded political rights, and resting upon humanity as it regarded private rights."

To these lofty sentiments I beg leave to give my humble concurrence. To these, as correct statements of the broad meaning and generous scope of the Fourteenth Amendment, I yield my fullest assent. Standing in this presence, I would not attempt to dwarf the proportions of that historic provision by seeking to restrict its beneficent operation to a particular class or race. No. The law is as broad as humanity itself. Wherever man is found within the vast confines of this Union, whatever his race, religion, or color, be he Caucasian, African, or Mongolian, be he Christian, infidel, or idolater, be he white, black, or copper-colored, he may take shelter under the shadow of this great law as under a shield against individual oppression in any form, individual injustice in any shape. It is a protection to all men, because they are men, members of the same great family, children of the same omnipotent Creator. In its comprehensive words I find written by the hand of a nation of sixty millions, in the firmament of imperishable law, the sentiment uttered more than a hundred years ago by the philosopher of Geneva, and reëchoed in this country by the authors of the Declaration of the Thirteen Colonies, proclaiming to the world the equality of man. And, realizing the dream of the poet, the philosopher, and the philanthropist, it may be that this great statute is destined to usher in the dawn of that era, when national antipathies and animosities shall be appeased, national boundaries and barriers obliterated, and, under a system of universal justice, man shall be allowed to claim from man, in all climes and in all countries, equal protection, equal security, and equal rights.

What, then, must a State of this Union do, in order to bear its share in carrying out the behests of this great commandment, that all men shall be equal—shall receive the equal protection of the laws? The State must see to it that no man, no class, no order of men are granted privileges, immunities, distinctions which are denied, upon the same terms, to

others; that no rank or superiority is accessible to one which is not, upon equal conditions, within the reach of all; that no badge of invidious discrimination or humiliating inferiority is affixed to any, the humblest member of the commonwealth. The State must see to it that the avenues leading to happiness are left equally open to all; that whatever pursuit is lawful for one is lawful equally for all; that whatever hopes, aspirations, ambitions are licit for the most exalted, shall be equally licit for the most humble; that into whatever paths leading to profit, place, or honor one man may venture to tread, all may, upon an equal footing, enter. To attain and accomplish these ends in all the States is, I conceive, in some degree, the object of the Fourteenth Amendment. Its mission was to raise the humble, the down-trodden, and the oppressed to the level of the most exalted upon the broad plane of humanity; to make man the equal of man; but not, as I imagine, to make the creature of the State—the bodiless, soulless, impalpable, and mystic being, called a corporation—the equal of the creature of God.

But, it is said that a corporation is composed of human beings, that these human beings do not cease to be such by becoming members of the corporation, that they still continue, therefore, to be entitled as before to the equal protection of the laws. But, I answer, that, by the very act of incorporation, these human beings receive rights, immunities, privileges, which form a part of the sovereign attributes of the State, and which are not enjoyed by any man in his individual capacity. By the very act of incorporation the equality between the corporate body—the group of corporate members, if you please—and isolated individuals is effectually destroyed. To enumerate no other, the State may grant to the corporation the right of eminent domain—a right which is possessed by no individual in the State. They, the corporation—or, if you please, the group of corporate members—take these discriminating privileges in their corporate capacity, asserting, and properly, that the equality between men is not thereby destroyed, because the privileges are granted to the corporation and not to the individuals; and, yet, when it comes to discriminating burdens imposed upon the corporation—or, if

you please, the group of corporate members—they claim that the burdens are imposed upon the individuals and not upon the corporation. I cannot conceive the reasoning by which a corporation is treated as a unit for the purpose of absorbing privileges which the sovereign grants, but must be be looked upon as disintegrated into its component parts for the purpose of bearing burdens which the sovereign imposes.

Therefore, I venture to repeat that the Fourteenth Amendment does not command equality between human beings and corporations; that the State need not subject corporations to the same laws which govern natural persons; that it may, without infringing the rule of equality, confer upon corporations rights, privileges, and immunities which are not enjoyed by natural persons; that it may, for the same reason, impose burdens upon a corporation, in the shape of taxation or otherwise, which are not imposed upon natural persons; that taxes, whatever shape they assume—whether in terms levied upon property, business, or income—are always, essentially, a charge upon persons—a contribution required by the State from those who receive the benefits of its government; that property, business, income, are mere standards to measure the liability of the person taxed;[1] that the rule of equality requires only that equality shall be observed among taxables of the same class; that therefore a tax of two per cent on the value of its property, the quantity of its business, or the amount of its income, might well be imposed upon a corporation, whilst a tax of only one per cent is imposed upon the property, business, or income of a natural person; that this might be done, though the nature and character of the property, business, or income were the same; for, though the prop-

[1] NOTE.—"The tax," says Burroughs, "is a contribution required of its citizens by the State, and, when it is measured, as to its amount, by the value or the productiveness of the property, it is still a tax on the person, and there is a personal liability of the person assessed with the tax. The individual and not his property pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged. The tax is imposed upon the person of the owner on account of his ownership of the property." [Burroughs on Taxation, § 9.]

"Reference to the average amount of deposits is made," says the Supreme Court of the United States in *Providence Institution* vs. *Massachusetts*, Wall, 623, "not as a description of the subject to be assessed, but as furnishing a basis of computing the amount of the tax to be paid by the corporation. The subject-matter to be taxed is the corporation, and the average amount of the deposits within the period named furnishes the basis of computing the amount."

erty, business, or income is the same, the person upon which the tax is imposed is essentially different.

That equal protection does not require that corporations should be governed by the same laws as natural persons, and that burdens may be imposed upon the former when, under precisely similar circumstances, none are imposed upon the latter, is fully illustrated by the recent decision of this Court in *Missouri Pacific Railroad Company* vs. *Humes*, No. 593. The action arose under a statute of Missouri which provides that "every railroad *corporation* * * * shall erect and maintain lawful fences on the sides of the road * * * and until fences * * * shall be made and maintained, such *corporation* shall be liable in double the amount of all damages" done by it to animals on the road. The plaintiff's mule having been killed on defendant's road, by reason of the corporation's neglect to build fences, a judgment in double the amount of its value was rendered in the Court below. The defendant was a railroad corporation. On error, it was urged that this statute deprived the defendant of the equal protection of the laws. I have had no access to the arguments, but I presume the contention was identical with that of the defendant in the case at bar, namely: that a corporation was a person, and entitled to immunity from all burdens which were not, under similar circumstances, imposed upon natural persons; that the statute imposed a penalty upon corporations where, for the same identical trespass, it imposed none upon an individual; that, if an individual owned a railroad and, through his neglect to build fences, an animal was killed, he was not subjected to double damages; but, under identically the same circumstances a corporation was so subjected; that this, therefore, was an injurious discrimination against corporations. But this Court, speaking through Mr. Justice Field, said:

"The objection that the statute of Missouri violates the clause of the Fourteenth Amendment, which prohibits a State to deny to any person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle guards, is

exacted, when its road passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equality where all *companies* are subjected to the same duties and liabilities under similar circumstances. See, on this point, *Barbier* vs. *Connolly*, 113 U. S. 27, and *Soon Hing* vs. *Crowley*, Ib. 703."

I have hitherto argued this cause upon the assumption that the State has the right to subject railroad property or the property of a railroad corporation to a system of taxation which may be more burdensome than that applicable to private property. I have endeavored to show that such a discrimination would be entirely justifiable. I shall now strive to demonstrate that, under the Constitution and laws of California applicable to the condition of the defendant here there is no such discrimination.

It is assumed, in the judgment rendered here, that the revenue system of California does make such a discrimination, and thereby works great injustice upon railroad corporations, from the asserted fact that, under it, they are made to bear a heavier load of the public burdens than they would if assessed as individuals are. It is affirmed by counsel for defendant that to injure these corporations was the mainspring of these provisions. It is said in the judgment here [record, pp. 112, 113]:

"The railroad companies in California are taxed yearly to an amount exceeding $600,000. Their property is heavily incumbered with mortgages, amounting to much more than its value. Why should they not be allowed by law, if they pay this sum, to credit it on their mortgages, as any natural person paying it would be allowed? Why should this unjust discrimination be made against them? Why should they, by law, be denied a credit for this more than $600,000 a year? Is there any justice in this denial? * * * Why then should not this system be pursued? The State would then collect all the taxes which it ought to collect; the tax being a lien upon the property could be enforced by a sale of the property, just as though it was levied on the property, and not upon the mortgages. *If the companies should then pay the tax, they could by law claim credit for it on their mortgages, and it would be deducted in the payment of the interest or principal of the bonds.* Then justice would be done to the corporations, as it is done to individuals."

The whole point of this asserted discrimination and injustice lies in the assumption that, if railroads were assessed as other property is, the mortgagees would be bound to pay the tax on the mortgage interest; and if, to protect itself, the company paid it, it would be entitled to recover it from the mortgagees, or to a credit for it upon the mortgage debt. The injustice charged against the Constitution of California, hath this extent, no more. If, therefore, it shall be shown that, if the property of this corporation were assessed as that of private individuals is assessed, the corporation would still be compelled to pay the tax on the mortgage interest—if it shall be made manifest that in this case, were the mortgage interest assessed to the mortgagees, the corporation and not the mortgagees would have to pay the tax on that interest—if it shall be demonstrated that, were the mortgage interest assessed to the mortgagees and the corporation paid the tax thereon, it never could recover the amount of that tax back from the mortgagees, nor get credit for it on its debt, then will these charges of wrong fall to the ground, these phantoms of injustice vanish. That this demonstration can be made is, to my mind, plain.

Upon the face of the mortgage in this case is the covenant to which I have already alluded. Under that covenant, as I have shown, the mortgagor is bound, under the laws of California, to pay the taxes levied upon the mortgage interest. Under those laws, if the mortgage interest was assessed to the mortgagee, and he paid the tax, he would be entitled to recover from the mortgagor the amount so paid. And this, as I have shown, is authoritatively settled by the decision of the Supreme Court of California in *Beckman* vs. *Skaggs*, 59 Cal. 541.

The Circuit Court, however, in the case at bar, without referring to this decision, held that, under the laws of California, the covenant in question would not have the operation given it by the Supreme Court of that State. But, it is submitted, that the decision of the highest judicial tribunal of a State, upon a question of the meaning or operation of its own Constitution and laws, is binding upon the Federal Courts. Regardless of that, however, I think it demonstrable that the Supreme Court of California was right on principle.

It is not denied that the covenant, at the time it was entered into, April, 1875, bound the mortgagor to pay the tax upon the whole of the property; for, at that time, a mortgage interest was not assessable, and, if it had been, there was no provision for deducting it from the intrinsic value of the property. Now, when the Constitution of 1879 divided, for purposes of assessment and taxation, the property into two parts—the mortgage interest and the residuum—it did not thereby change, nor diminish, nor destroy the mortgaged property. That remains still the same. The only change made is that the State now subdivides it, for purposes of taxation, assessing one part to the mortgagee, the rest to the mortgagor. The obligation, however, to pay the tax upon the whole property, whether subdivided or not, still rests, by virtue of the covenant, upon the mortgagor. Such is the language of his bond: "I will pay the whole tax upon the whole property."

It is not denied that this was the effect of the covenant when it was entered into. But, it is said by the learned Circuit Court, the covenant expresses no more than the law at that time implied, "the covenant creates no greater liability than would have existed without it;" for the law, as it then stood, obligated the mortgagor to pay the tax upon the property mortgaged—the whole of it. From this unquestionable fact the conclusion is drawn that, when the law changed and charged the mortgagee with the obligation of paying the State upon a part of the property, the covenant changed with the law. In other words, from the fact that an express contract happens to embody the terms of a then existing law, the contract will fluctuate with the fluctuations of the future law, expanding as it expands, contracting as it contracts, or vanishing altogether if the law is altogether abolished.

It is obvious, on a moment's reflection, that this is not the case. When parties have made an express contract, lawful when made, they have placed themselves under the shield of the Constitution of the United States, beyond the reach of any law impairing or changing its obligations. The fact that the contract, when made, but expressed a legal obligation which the law would have recognized and enforced without the con-

tract, is an immaterial coincidence. By embodying the law into their contract the parties have given fixity to the legal obligation, and placed it beyond the reach of subsequent mutations in the law. The law may change; the contract remains. To illustrate: Under the present law of California, money due upon a written contract, which makes no mention of interest, bears interest at the rate of seven per cent per annum after maturity. If, therefore, A gives B his written promise to pay him $1,000 in ninety days, with interest at the rate of seven per cent per annum after maturity, the clause stipulating for interest but embodies an obligation imposed by law, for, without that clause, the law would allow the interest at seven per cent after maturity. But, does it follow, therefore, that a change in the law will work a change in the contract? If a subsequent statute should enact that interest upon written promises to pay money shall be allowed at the rate of ten per cent, or five per cent, fifteen per cent, or two per cent, would the written contract of the parties keep pace with these mutations? Would the promisor be compelled to pay more than he promised, or the promisee to take less than he agreed? I submit that these questions admit of but one answer. I submit, further, that the rulings of the Circuit Court that a change in the law wrought a change in the covenant contained in the mortgage here is clearly indefensible.

At the time this covenant was entered into, then, it obligated the mortgagor to pay the taxes upon the whole property mortgaged. That obligation continues in full force to-day, unaffected and unimpaired by any change in the Constitution or laws. What the mortgagor was bound to pay then he is bound to pay now. Though the property is assessed now in fragments, instead of in gross as formerly, yet the mortgagor though he pays the tax levied upon all the parts pays to-day no more than he promised. Though he pays upon his own and the mortgagee's interest, the aggregate of both is not and can never be more than the whole property mortgaged.

This position, if correct, is, I submit, not only a complete answer to the charge of injustice formulated by the Circuit

Court, but is a complete refutation of the charge of discrimination against the defendants. If the matter be as I have stated it, the defendants are not discriminated against. They are not injured. They pay precisely the same as a private person does under the same circumstances.

This is an important branch of my argument, one which has always appeared to me conclusive. I therefore beg leave to detain the Court's attention upon it.

The whole ground of defendant's complaint is discrimination. How, it is asked, is this discrimination wrought? Because, they answer, other taxpayers are allowed to deduct their mortgages from the value of their property and we are not. But, it is then asked, is this discrimination injurious? They answer, it is injurious. How, it is further asked, is the injury inflicted? Because, they answer, if we were permitted to deduct the mortgage interest from the value of our property, we would not have to pay the taxes upon that interest.

I understand the rule as to discrimination, as gathered from the decisions of this Court, to be this: Where it appears, from the very language of a statute, that it cannot operate at all or in any case without destroying the equality which the Constitution enjoins, the statute is absolutely void upon its face; but where the scope of the statute is such that it does not necessarily and unavoidably destroy equality, and it can not be determined without examining into the facts of each particular case whether inequality results or not from its operation, then the statute is not void upon its face, but the party complaining of it must show, by the facts of his own particular case before the Court, that the statute does, in truth, discriminate injuriously against him in that case. The Constitution of California obviously belongs to the latter class of laws. It works no discrimination against railroad companies which have no mortgage to deduct. The defendants here must then show that they had a mortgage to deduct, and that the fact that they are not permitted to deduct that mortgage operates as an injurious discrimination against them.

No clearer illustration of the principles for which I am now contending can be found than the case from which I

have already read in 105 U. S., the case of *Stanley* vs. *The Supervisors*. There was an Act of Congress granting States permission to tax national bank shares, upon condition that they should tax them at the same rate as they did other moneyed capital in the State. The State of New York passed a law in which it said that, as to other moneyed capital, the taxpayer might deduct his debts from it, but, as to bank shares, they should be assessed without any deduction. This Court had already decided, long before this case, that that was a violation of the principle of equality embodied in the permission given by Congress; that it was not taxing the bank shares of the national banks at the same rate that other capital in the State was taxed.

Now, I read from Mr. Justice Miller's opinion, page 305:

"The ground of this recovery was that the statute of New York under which the shares were assessed was void, because it did not permit the shareholder to make deduction of the amount of his debts from the valuation of his shares of stock in ascertaining the amount for which they should be taxed."

Now, says the learned Justice:

"Accepting, therefore, as we must, the Act of 1866 as construed by the Court of Appeals of New York as not authorizing any deduction for debts by a shareholder of a national bank, is it, for that reason, absolutely void? What is there to render it void as to a shareholder in a national bank who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. *He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction.* What legal interest has he in a question which only affects others? Why should he invoke the protection of the Acts of Congress in a case where he has no rights to protect? Is a Court to sit and decide abstract questions of law, in which the parties before it show no interest, and which, if decided either way, affect no right of theirs? It would seem that if the Act remains a valid rule of assessment for shares of State banks, and for individual bankers, it should also remain the rule for shareholders of national banks, who have no debts to deduct, and who could not, therefore, deduct anything if the statute conformed to the requirements of the Act of Congress. It is very difficult to perceive why the Act of the Legislature should be held void any further than when it affects some right conferred by the Act of Congress. If no such right

exists, the delicate duty of declaring by this Court that an Act of State legislation is void, is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit."

The learned Justice then quotes the decision in the case of the State Freight Tax, which I have already referred to, and goes on to say:

"But, in a review of the cases in this Court on this subject, *Austin* v. *Aldermen*, 7 Wallace, 694, will be found most nearly to resemble the one before us. It related to the same matter of the invalidity of a statute of a State taxing shares of the national banks as being in conflict with the Act of Congress. That Act said that such taxes might be assessed at the place where said bank was located, and not elsewhere. The statute directed the assessment and taxation of the shares at the place where the owner resided. Austin, having contested the tax on his shares in the Courts of the State, unsuccessfully, brought the case here by writ of error. This Court declined to enter upon the question of the validity of the statute, because the case did not show that he was taxed on his shares in any other place than that where the bank was located. The argument of counsel in the case before us is that any tax, or a tax, on any person, on account of his bank shares, is void, because the whole of the New York statute is void. If the argument is sound, it was equally applicable to Austin's case, in which the statute, which made no limitation of taxation to the place where the bank was located, must have been held void under any principle which would wholly invalidate the statute of New York, because the latter did not allow the deduction of the owner's indebtedness from his shares. And if in that case the Massachusetts statute was utterly void as to national bank shares, then, the tax on Austin's shares in Boston was void, and he had a right to be protected against the unconstitutional statute. *The Court evidently went upon the principle that the statute was only void as against the Act of Congress, in cases where some one was injured by the particular matter in which there was such conflict.* The case seems to us directly in point."

In other words, the parties cannot come into this Court, present the law to your Honors, abstract it from the facts of this particular case, and call upon you to decide the abstract question that the law is void. Say these decisions: "Granting that the law, upon its face, shows a purpose to make an injurious discrimination, still, as it does not necessarily and unavoidably follow that such discrimination takes place in

every case, you must show, by the facts of the case before the Court, that you have been injured by that law. Until you do so, you have no standing in Court."

These defendants obviously appreciate, and have appreciated from the beginning, the force and cogency of the principles to which I advert. They well understand that they have no standing in Court, unless they can show that they have a mortgage which might have been deducted from the value of this property. That is the very basis of their case. Had they come here and set out the obnoxious statute at length, but said nothing about their having a mortgage or showing that they were, in point of fact, in this particular case, injured by the law, then, by virtue of these principles, your Honors would have held a demurrer to their answer well taken.

Now, in the light of those decisions, I say to these defendants: When the railroad or other *quasi*-public corporation has no mortgage to deduct, then the law provides a mode of assessment valid for them which is not in conflict with the Fourteenth Amendment. The law, in that case, can be held valid. Under the decision in *Austin* vs. *Aldermen*, it is valid as to them. But, not only must the defendants produce a mortgage, but they must prove that, by not being permitted to deduct that mortgage from their property they were, in the matter of assessment and taxation, injured. Now, when the defendants produce this mortgage they prove by it that they are not injured. They show that, in point of fact, they are not discriminated against. The very evidence which proves the discrimination also disproves it. The mortgage is, at once, the poison and the antidote. It proves that they pay just the same as all other persons do under the same circumstances. This is perfectly obvious by comparison. If a private person owned property upon which he had given a mortgage containing the same covenant as that set forth in defendant's mortgage, how would the property be assessed? The mortgage interest would be assessed to the mortgagee, and the residuum to the mortgagor; but, the mortgagor, by reason of his covenant, would pay the tax levied on both interests, that is, on the whole property. This is pre-

cisely what happens in the case of the defendant here. The only difference is that the State, instead of pursuing the roundabout way of subdividing the interests, assesses the whole property directly to him who, in the end, is bound to pay the tax upon the whole. In the first case, the State collects the tax upon the mortgage interest from the mortgagee and permits him to recover it back from the mortgagor [*Beckman* vs. *Skaggs*]; in the other the State avoids this circuit and itself collects the tax directly from the mortgagor. The effect upon all parties is, in the end, the same. The State gets the same tax and no more; the mortgagee pays nothing, and the mortgagor pays the whole tax. Where is the discrimination? Where the injury? Where the injustice?

But, it is urged that the power of the State to levy a tax can not depend or be derived from this covenant, for, says the learned Circuit Justice [Record, pp. 109, 110]:

"The power of the State is not enlarged or diminished by it. It is not made with the State and could not be enforced by it. So far as the power or action of the State is concerned, it can not possibly have any influence. It is a matter which concerns only the parties. They can by arrangement vary it any day; they may enlarge it, qualify it, or release it whenever they choose. It would be strange indeed if the power of the State in taxation depended in any way upon the stipulation of third parties, or the validity of a tax could be affected by it;" and the learned Circuit Judge adds [p. 139]: "It is gravely and earnestly asserted here, that under this covenant the defendant had bound itself to the trustees to pay the whole taxes assessed upon the property covered by the mortgage; that if the tax should be assessed upon defendant, and there should be a recovery in this case and payment of the judgment, the defendant would pay no more than it is bound to pay under the covenant in the trust deed, and could not be injured; *therefore the tax is valid*, and a recovery should be had in this action, *even though the tax*, as levied against the defendant, *is unauthorized by any valid law, or was levied without the authority of any law.* It would seem to be only necessary to state the proposition to make manifest its fallacy."

Of course, the proposition thus stated by the learned Judge is not only fallacious—it is preposterous. I need hardly assure your Honors that counsel for the plaintiff have never been guilty of the nonsensical absurdity of claiming that

"the tax is valid, though unauthorized by any law or levied without the authority of any law."

The position of the plaintiff never was that stated by the learned Judge. That position was and is as follows: The law by virtue of which the defendant has been assessed is attacked upon the sole ground that it contravenes the provision of the Fourteenth Amendment which guarantees to the defendant the equal protection of the laws; this infraction, the defendant asserts, consists in an injurious discrimination made against it, in that, whilst where other persons have given a mortgage on their property, the mortgage interest is assessed to the mortgagee and he pays the taxes levied thereon, yet, if the defendant have given a mortgage, the law says that the mortgage interest shall be assessed to the defendant and it shall pay the taxes levied thereon. This is the only discrimination claimed, and in this alone consists the alleged invalidity of the law. Now, in answer to this position, the plaintiff insists: First, the Court cannot declare, by a simple inspection of the law, that the defendant has been discriminated against; discrimination is a fact, and must be proved as such by evidence in the case on trial; the complaining party must show that, in the case before the Court, he is injured by the law, for it is the effect of the law and not its purpose which the Court looks to, and, if the complaining party is not injured by the operation and enforcement of law, the law is valid as to him; Secondly, the defendant, then, is compelled to show that it has a mortgage—if it had none, it would have no ground of complaint; the defendant produces its mortgage for the purpose of showing that, had its property been assessed like that of other persons, this mortgage would have been assessed to the mortgagee and the mortgagee would have paid the taxes upon it; but, Thirdly, at the same time that it proves its mortgage, the defendant also proves that the mortgagee would not have paid the taxes upon it, but it, the mortgagor, would have paid them; the defendant, then, completely refutes its claim of discrimination, and fails in the only attack which it makes upon the law—therefore the law remains valid as to it. In fine, the defendant's claim of discrimination is shown to be unfounded,

when, according to its own evidence, it proves that were it assessed as other persons are, it would pay precisely the same tax as it does now.

I now take leave of the Federal questions in this cause, and proceed to examine briefly some minor points which include no question of constitutional law, but simply refer to modes of procedure under the statutes of the State.

Objection is made to a recovery here because it is claimed: 1. The plaintiff has offered no legal evidence of any assessment, and if it has it is void for want of description—uncertainty. 2. The fences on the line of the road were improperly included in the assessment of the roadway, because, in the first place, they were not proved to be the property of defendant, and secondly, they were not within the jurisdiction of the Board of Equalization. 3. No interest can be recovered upon these delinquent taxes.

I shall endeavor to answer these points in the order stated:

I. The property assessed in this case lies wholly within the County of Santa Clara. To prove its case the county offered in evidence:

1. The assessment roll of the county. [Record, p. 60.] 2. The delinquent list of the county. [Record, p. 62.] 3. The order of the Board of Supervisors dispensing with the duplicate assessment roll. [Record, 63.]

Any one of these documents is sufficient to establish the plaintiff's case. [Political Code, § 3789.]

The mode of assessment is this: The Board of Equalization fix the value of the road; on or before the fifteenth of May they transmit to the County Assessor "a statement showing the length of the main track within the county, and the assessed value per mile of the same as fixed by a *pro rata* distribution per mile of the assessed value of the whole." With the transmission of this statement the labors and duties of the Board absolutely cease. They have nothing further to do with the assessment of the property nor the levy and collection of the tax. All that is done by the county officers.

When the County Assessor receives the statement from

the Board, he enters it upon the county assessment book. "Said statement shall be entered on the assessment roll of the county," says the Code. When thus entered, says the Code, "all such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties." "The taxes on said property, for State and county purposes, after collection by the County Collector, shall be paid over to the County Treasurer as other taxes."

Now, after taxes are collected, delinquent lists are made up of all unpaid taxes. [§§ 3758, 3759, 3761, 3762.]

Now follows § 3789:

"The Assessment Book, Duplicate Assessment Book, or Delinquent List, or a copy thereof certified by the County Auditor, showing unpaid taxes against any person or property, is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with."

It is said this was law before the Constitution; and so were all the methods prescribed for the collection of taxes now applied to railroad property. If the fact that a law was passed before the Constitution makes it inapplicable to railroad assessment and taxation, there is to-day no law in California for assessing, levying, or collecting taxes from railroads.

As to the descriptions it follows precisely the description furnished by the defendants themselves. [Record 56, 60.] The idea that this description is insufficient to identify the property is little less than absurd. The defendants having furnished it are estopped from denying its sufficiency.

II. The Board included the fences in the assessment, it is next urged.

It is said that the plaintiff ought to have proved that the fences belonged to defendant. The *prima facie* case made out by the plaintiff's documents establishes everything necessary to its recovery—among which is, that the property assessed belongs to the taxpayers assessed. Besides, as a general rule, fences belong to the railroads whose right of way they inclose. [Civ. Code, § 485.] The defendants, in rebuttal of plaintiff's

prima facie case, have not proved that they did not own the fences. All the presumptions, then, arising from the plaintiff's *prima facie* case, remain standing in full force.

Such fences are not enumerated by the Code among the things assessable by local assessors. These are, "the depots, station grounds, shops, buildings, and gravel beds." [Pol. Code, § 3664.] Obviously, then, unless the Legislature intended they should not be taxed, they are to be assessed by the Board of Equalization as a part of the roadway.

Fences built upon the line of the roadway are a part of the roadway as necessary to its protection. As much so as the railing of a bridge is a part of the bridge, or the framework of a tunnel is part of the tunnel. Such has always been the understanding of the law in California, and the fences have always been assessed by the Board of Equalization.

I have never been able to grasp the proposition that fences are no part of the railroad which they inclose. If the defendant made a conveyance of "its railroad from San Francisco to San José" would not the fences pass by the deed? Clearly as much so as a sale of my garden would convey the fence which incloses the garden.

III. The taxes draw interest.

Under the laws of California, after the assessment roll is complete and the tax levied, the book is delivered into the hands of the Tax Collector, whose duty it is to collect the same. Taxes may be paid until the last Monday in December. On that day all unpaid taxes are by law declared to be delinquent. [Pol. Code, § 3756.] Therefore the Tax Collector makes a list of these unpaid taxes and delivers the same to the Auditor. This list is by law called the "delinquent list." [§ 3759.] The Auditor examines the list, compares it with the names upon the assessment roll which have not been marked "paid," and, finding it correct, certifies it and delivers it back to the Tax Collector. [§ 3762.] On the first Monday in February the delinquent list is published, and notice that the property therein will be offered for sale is given. [§ 3764.] After the sale, the Tax Collector, on the

third Monday in March, settles with the Auditor, and compares the delinquent list with the assessment roll in his hands. The Tax Collector, at the time of this settlement and comparison, makes an affidavit to the correctness of the delinquent list in the condition in which he delivers it to the Auditor, to the effect that the taxes not marked "paid" thereon, have not been paid, and that he has not been able to discover any property whereof to collect them. [§ 3800.] The Auditor then marks the word "paid" on the assessment book wherever the tax has been collected, leaving, wherever the tax has not been paid, the name without the word "paid." [§ 3797.] After this the taxes not marked "paid" are still delinquent; for from the last Monday in December, all taxes on the assessment roll not having opposite the name the word "paid" are delinquent.

Now follows the section in question: Interest at the rate of two per cent per month must be collected on such delinquent taxes from the time they were first delinquent until paid. [§ 3803.]

What are the delinquent taxes mentioned? Clearly the taxes remaining delinquent, *i. e.*, not marked "paid" on the assessment roll after the settlement between the Tax Collector and the Auditor on the third Monday in March.[1] And such is the construction given by our Courts.

Harper vs. *Rowe*, 53 Cal. 233.
Lake County vs. *Sulphur Bank*, 4 W. C. R. 186.
Same vs. *Same*, Nov. 19, 1885.

There is another aspect of the question of interest which, in view of the decision of this Court in *Litchfield* vs. *Webster*, it may not be improper to state.

Under the decisions of the Supreme Court of California a tax is a debt.

Sacramento County vs. *C. P. R. R. Co.*, 61 Cal., 250.
Gaslight Co. vs. *Brickwedel*, 62 Cal. 641.

[1] NOTE.—All the cases of the Santa Clara group were commenced after the third Monday in March; it is asserted by counsel for defendant that the San Bernardino case was not.

Under the laws of California a tax levied has the effect of a judgment against the taxpayer. [Pol. Code, § 3716.][1] And all debts for a liquidated amount, and all judgments bear interest at the rate of seven per cent per annum. [Civil Code, §§ 1917, 1920, 3288.][2]

I have now done. I am conscious of having occupied no inconsiderable portion of the time allotted by the Court for the argument—not longer, I hope, however, than the importance of the questions at issue warrants. In saying this, I am not unmindful of the propensity of counsel to magnify their causes. Self complacency is ever ready to whisper exaggerated notions of the magnitude of our undertakings. Yet, I cannot but think that the controversy now debated before your Honors is of no ordinary importance. It is important to the people of California, not only on account of the very large amount at stake; but more, for that it involves the validity of their laws and Constitution. It is important to the many States whose revenue systems, similar to that of California, are menaced by the same attack. It is important to every State of this Union, whose sovereign attribute of taxation is here challenged. That your Honors may now take the questions discussed from the region of controversy in which they have been agitated for the last six years, and place them in the realm of fixed law, these cases are now submitted to the Court.

---

[1] "Every tax has the effect of a judgment against the person, and every lien created by this Title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied, nor the lien removed, until the taxes are paid, or the property sold for the payment thereof."

[2] "§ 1917. Unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of seven per cent per annum, after they become due on any instrument of writing, except a judgment, and on moneys lent or due on settlement of accounts, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him. In the computation of interest for a period less than a year, three hundred and sixty days are deemed to constitute a year.

"§ 1920. Interest is payable on judgments recovered in the Courts of this State, at the rate of seven per cent per annum, and no greater rate; but such interest must not be compounded in any manner or form.

"§ 3288. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

118-394 & 417

SUPREME COURT U. S.
FILED
MAR 10 1886
JAMES H. McKENNEY,
CLERK.

CALIFORNIA RAILROAD TAX CASES.

In the Supreme Court of the United States.

THE COUNTY OF SANTA CLARA, Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 464.

THE COUNTY OF SAN BERNARDINO, Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 619.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,
vs.
THE NORTHERN RAILROAD COMPANY. } No. 620.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 621.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 622.

Oral Argument of Mr. EVARTS, for Defendants in Error.

THOMAS McGILL & CO., Law Printers, Washington, D. C.

CALIFORNIA RAILROAD TAX CASES.

IN THE

Supreme Court of the United States.

THE COUNTY OF SANTA CLARA, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 464.
THE COUNTY OF SAN BERNARDINO, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 619.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE NORTHERN RAILROAD COMPANY.	No. 620.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY.	No. 621.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE SOUTHERN PACIFIC RAILROAD COMPANY.	No. 622.

Oral Argument of Mr. EVARTS, for Defendants in Error.

IF THE COURT PLEASE, I find the contentions as presented on either side in the briefs reduced to but few propositions

as applicable to any general principles in discussion. The plaintiffs in error allege as principal errors assigned, that the court below erred in holding (1) that the taxation here in question denies "the equal protection of the laws;" (2) that it deprives the taxpayer "without due process of law;" (3) that the taxpayer had not due notice of the assessment; and then a more general proposition, (4) that the State denied to the defendants the equal protection of the laws.

Discarding the third of these propositions as immaterial to any discussion that I shall ask your Honors' attention to, there is then nothing but the proposition that the error in the decision below is that the taxation impugned denied the equal protection of the laws to these defendants, and that it deprived the taxpayer without due process of law.

In the very careful brief of my associate there are enumerated nine propositions covering, as properly they should do, all the important though minor considerations; but of them I take these five as meeting, in form, the general contention that is put forth on the other side: The fourth item given in Mr. Sanderson's brief is that the franchise is a Federal franchise, and therefore not the subject of State taxation; 5th. That the corporations are persons within the Fourteenth Amendment; 7th. That the constitution and laws of California in the assessment of property discriminate against *quasi* public corporations, subjecting them to more onerous taxation than other taxpayers, thus denying the equal protection of the laws; 8th. That no notice being provided for the assessment of railroads in more than one county, this deprives those companies of property without due process of law; and 9th. That the present constitution, in this regard, is not an exercise of the power to alter or repeal the franchises of the corporation.

Now, of these principal statements there are only three that I need to consider: the franchise of the United States, the operation by its discrimination against *quasi* public

corporations, and the general notion of what the application of the Fourteenth Amendment is or should be.

The questions of notice have been adequately presented on the one side and the other; and I do not propose to include in my survey of this subject any attention to that matter. I could add nothing to what has been said by my learned associate in his brief and in his argument, and I do not need to meet any objections to his views that have been made which have not been fairly considered in my learned associate's brief.

In my view, if your Honors please, the elements of this debate and the principles upon which its decision is to turn are very few and very simple; and I submit to your Honors that all the facts, and all the illustrative surrounding circumstances that should bear upon this narrow debate and this narrow range of decision, are so exposed and so explicitly displayed before your Honors that no disputes need to arise in the progress of any discussion about the sense and meaning of the actual transactions happening in the State of California in reference to these corporations.

Although it is entirely true that the contention, insisted upon at some stages of this controversy, that a corporation *simpliciter* is not within the Fourteenth Amendment, as a distinct proposition no longer needs refutation on my side by your Honors' express instruction upon that point, it is necessary to the view which I intend to present that we should understand fully what is meant by the fact, and the reason of the fact, and the extent and pressure of that fact, that a corporation *is* included within the Fourteenth Amendment. Everything bearing on this, in my apprehension, of importance, I can state in a very few words.

I ask your Honor's attention to the Fifth Amendment of the Constitution, which, as we know, first introduced these protections of private property in terms into the Constitution. The last clauses of that article are all that relate to this matter of property. "Nor be deprived"—that is, no

person shall "be deprived of life, liberty or property without due process of law." And then the form of negation is changed and "*property*" is named as the noun, as follows: "Nor shall private property be taken for public use without just compensation."

I submit that the change of phrase in the very last clause carries no further operation in protection of *property* from that particular invasion, carries the range of property protected no further than if the former phrase—that a *person* should not be deprived of property—had been followed in the last clause, or that the last had been adopted and used in the first clause, making the property, as of the life and the liberty in the first case, as well, the *subject* that is protected. If it is named as depriving a *person of his property*, or saying that *his property shall not be taken*, the only notion of ownership in either phrase is included in the very idea of *property*. Property is not referred to in any material qualities or any form of aggregation or incidents of value, but it is the "property" that is protected in the same sense as "life" and "liberty" are protected. When, therefore, it comes to the question of who is exposed to injury from thus encroaching upon property, it involves the necessary idea of an ownership in it; and the encroachment is upon the rights of ownership no matter how that ownership is represented, or measured, or governed, or controlled, to persons. The essential proposition is included in the one word "property;" that is, whatever is owned and by whomsoever owned, and in whatever shape or degree it is the subject of ownership.

When, therefore, it is said that property cannot be taken or a person cannot be deprived of property, this means that the action prohibited or the action perpetrated, notwithstanding the prohibition, is to be regarded in the eye of the law only as to whether *persons* are affected thereby. Property is of no account in the debates of the law except in relation to an owner and a person, and all forms of organ-

ization of ownership among men whereby they lawfully come to have that relation to property, that property is to be protected by protecting its owners.

The Constitution has provided an instance in which rights could be maintained in the Federal courts when disputes arise between citizens of different States. There came up a question whether a *corporation* was included within the term "citizens;" and the first doctrine, as we all remember, was that it did apply to citizens when the corporation was composed wholly of citizens of the one State. Well, why was that held? Corporations *per se* were never citizens, and never could be, within the meaning of the Constitution, "citizens" *simpliciter*. The proposition, therefore, was that citizens were to have a right to protect themselves in regard to their interests of property and otherwise in the Federal courts; and it was held that this was not a restriction to political citizenship, but was extended to whatever represented the interests of the citizens. That doctrine rested upon this general proposition, that the real ownership and the real interest was in the living persons, and that by no contrivance of evasion could these actual rights be either oppressed or disparaged without the same means and rights of protecting themselves in regard to these, their real actual interests, being open to them, under the Constitution, although their investments and their organization of ownership were in the shape of corporate property. Subsequently your Honors changed the rule according to which suits might be maintained by a corporation in the courts of the United States, but always upon the same idea that the *persons making up the corporation* were entitled to the constitutional procedure.

Mr. Justice MILLER: It was held that it would be presumed corporations were composed of citizens of the State.

Mr. EVARTS: I shall have no occasion to discuss that point; but your original proposition, by which a corporation could be called a citizen, was that, in regard to the

subject-matter and the application and the need and the protection, it was of citizens or men who, as such, were entitled in any form to rightful ownership and rightful enjoyment. In other words, the traits of the artificial creature, which the law has for so many hundreds of years recognized as having an existence and an endowment of administration of property and management of ownership, were all trivial and nugatory, when you had to look at who owned the property, who was to be deprived and who was to suffer from injustice, and that it was the ownership of persons in the subject-matter of property that was invaded. The distinction drawn in the books between rights of persons and rights of things is nothing but the distinction between rights of persons *simpliciter* and rights of persons in regard to things; property has no rights except because it belongs to and is the interest of some person.

Now we come to the 14th amendment. You will find that the construction which you have given to it, that it includes corporations, must rest, and does rest, not upon any original reasoning, but upon the reasoning that had been adopted and applied under the 5th amendment and under the clause of the original Constitution, to which I have referred. This proceeds:

> "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Here it is again that when we are talking of property, which is the whole subject-matter here, the same ideas are to be transferred to this clause, and the State in regard to property is not to deny equal protection to any persons having relation of ownership and interest in property.

If this be so, our next proposition is to consider what this State of California has undertaken to do in determining what shall be lawful and what shall be law in the mat-

ter, that we are to look at now exclusively, of taxation of property. What has this State established as its protection of law, in that regard of ownership in property, in respect of its exposure to taxation, that the Constitution of the United States may be appealed to, to see wherein its administration of its taxation gives or denies equal protection to all under whatever statutes, and their constructions of them applicable to the subjects of their dominion? Now here it would seem too that our discussion needs only to be very brief. How much of regulation of taxation by forecast in undertaking to make it equal—undertaking to attain what Mr. Justice Miller has suggested is impossible accurately and mathematically—how much is wise, and how much of miscarriage or disappointment may occur upon attempts to apply and execute such general propositions, is aside from our discussion here. Our discussion at present is what the laws of California are in respect to the equality of taxation of property, as property, exposed to taxation. The constitution of California might have adopted the phrases that are used in other constitutions of the States. It might have relied upon generalities, or it might have gone into greater details; but the terms of *this* Constitution are very simple and very comprehensive. It undertakes to find an adequate, a reasonable, and a useful method of taxation for its citizens and all interests that are included under its power and administration; and what that Constitution has laid down as the law you are to compare with the action of that State complained of as to its being incompatible or compatible with the equal protection of the law which it is your duty to see is not denied.

The constitution provides in this way. In the first place it undertakes to take up property *simpliciter* as the subject which it is to apply, and to which it is to apply, as well, the operation of taxation:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law."

That is the equality that the constitution has provided. If we leave out the *exemption*—which is that of property of the United States alone—the clause speaks as distinctly and as plainly and as comprehensively, on the subject treated of, as language can frame or imagine:

"All property in the State shall be taxed in proportion to its value, to be ascertained as provided by law."

That the value is to be "*ascertained*" by law does not disparage in the least the vigor of the mandate of the constitution in respect to the scheme of taxation, and the administration of that scheme and of the duty of ascertainment under it. We may read then this as what this State has adopted for equality in taxation, that all property in the State, no matter what it is, shall be taxed in proportion to its value.

My first proposition in regard to that is, that it is an absolute necessity under the constitution that "property" and "value" are the only ideas that are to enter into the distribution of the burden of taxation. It is no respecter of persons and no respecter of the pursuits or modes of enjoyment and application of property. No discriminations can be made in any regard as to the way in which it is owned, or the manner in which it is used, or the preference the State has for encouragement of one, lawful and useful, and repugnance to another, lawful but not useful, pursuit.

That subject of in what form you own property, and that subject of how you use property, and how you get this and that profit from one use, and lesser from another, have nothing to do with your right of discrimination. You have a right, as a matter of fact, to determine that the uses and profits and methods give value to property, but only in the single fact, that then presently before you, in estimating what the value is you are to take it as it is; and if one kind of property is worth in value (which is your

only criterion,) $100,000, and another kind of property is worth $100,000, one yielding 3 per cent. by its security and another 20 per cent. by its venture and enterprise, each marks what the value is; but no discrimination can be made after the value has been made equal, by reason of other consideration.

Now, if this clause of the constitution is obeyed, if it is appreciated, then you can see how the solution of the question of whether, in any case, this equality of taxation has been evaded or nullified, or has been observed, is one of direct attention to this simple provision. It is not, therefore, our duty to consider whether the administration by the State, and the management and control and distribution and collection of taxes, must be conformed to, or may vary from, these or those circumstances that are reasonable; those subjects have nothing to do with it if your Honors see that the equality requires that *all* property shall be taxed, and *all* shall be taxed simply by and for its *value.*

Now, what does its "value" mean? It does not mean its value to the State; it does not mean the value to the nation; it does not mean the value to the people and the interests of society. It means the value to the owner, whoever is the owner, that must bear the taxation; must part with the tax; must suffer from the burden. When the constitution has said to him that he is protected absolutely in that regard—that the burdens are to be equal and are to be distributed upon property, as it lies before the taxing power, and in its *value* and nothing else—that there can be no favor to property of one kind and disfavor to proper of another kind; that it cannot favor use in one way and disparage use in another, you must then rest directly here, that when you are imposing a burden that is felt by him who is to pay it, you are to see that nothing but property, and the value as such, to him, is the subject that is to be your rule of apportionment.

The next clause of the constitution is not a qualification

of the general and peremptory provision which I have read. It is rather to show that there is included in the name of "property" and in the unity of the name and purpose of "property" for taxation, all the diversities of property that are within the comprehension, expectation, and forecast of legislation.

"Money, credits, bonds, stock, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

That is to exclude conclusions that property does not take in all these; finally ending in the comprehensive, universal proposition, anything that can be owned. Then there is an exemption of "growing crops" and public school property, and property of the United States and State and municipal corporations.

Now, there is another subject it takes up, and that is it provides as an exception from what was regarded, perhaps, as prohibitive unless this was made:

"The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona fide* residents of this State."

These exceptions do not touch the scheme of taxation as insisted upon; and, therefore, we start upon the proposition that this uniformity and this absolute restriction of admeasurement of tax to ownership, as value to the owner, is the universal rule.

There is a clause providing that what would be debts in the particular form of mortgage on land is to be regarded, not to sustain in future the mere relation of debt and credit, and of property and reduction of property by debt; but this particular form of property itself shall be assigned and distributed, and the owner shall be the owner of what is not reduced by the mortgage, and the mortgagee shall own what is included in the mortgage; but railroads and other

quasi public corporations are excepted from that distribution. There is no other exception of them except from that distribution of ownership of property.

The point, and the useful point, in this legislation, by the constitution and under it, was to be sure that when the impropriety was seen of taxing property twice, first to the owner for the whole fee and then to the mortgagee for the part that had been taken, so to speak, in value from the whole fee, and conferred upon the mortgagee when that was to be avoided, the State was to take care that for the purpose of one taxation of the whole property there should neither be any evasion nor any diminution of the tax to be got out of the whole fee thus divided, and to make therefore the estate of mortgagees wherever they resided as being interested in property within the State, to wit, an estate in the property itself. That provision is not to be questioned, either in regard to its wisdom or in regard to its entire validity. It does not depart at all from the absolute uniformity that the property in this form should bear the whole burden in the same relation and value compared with other forms of property, but it was a division according to the estate, where one was taxable for one interest and the other for another.

Now, if the court please, on this head of our consideration, which is the equality of protection from the law, we have only to compare this method of taxation applied to these defendants with the matter of the constitution and of the laws in pursuance of it, and then if an inequality is established there remains only on this branch of the inquiry whether that inequality is one that the Fourteenth Amendment can protect the owners of this kind of property against.

There are various reasons given why the administration may vary in the collection of burdens upon this and that kind of property. If it does not operate an infringement of the principle of equality of taxation upon the uniform

basis of property as valuable to the man taxed, there is no disparity in the burden. When it comes from mere incident of tax and collection, it ought not to make any. This diversity of methods open to the State ought not to produce any disparity in the burden which falls upon the taxpayer. But if it must necessarily make some disparity, it is to be attributed to the necessary action and method of administration of the tax. But, on the contrary, whenever anything does operate in that name and to that effect, so that a man pays a rate of exaction from him, having his property invested as it is used, as it is managed, by which taxation fastens upon that mode and form, and departs from the injunction of the constitution that it shall be mere naked value, and value to him that is to be looked at—then the equality is not observed, then the inequality has been practised, and then there remains only the question whether it is within the duty and the authority of this court to protect him.

Well, supposing that a man is a shipowner, what is the question for his taxing? What his ship is worth; what its value is; what its value is, in the same sense, without defining what that sense is in the abstract, in which it applies to all other property that is to be comprehended within taxation, and for equal distribution of burdens. It is a simple question what the ship is worth. If it is mortgaged, whatever the law is in other property is the law for him. No distinction can be made. What shall you say of shipowners whose property, in this form of employment, is in the coasting trade, and of others in foreign commerce, and the coasting trade receives less measure of profits than foreign commerce yields, or *vice versa*—what are you going to do about that? Are you going to say that the owners of ships engaged in foreign commerce shall have one mode of estimating the value to the owners of ships thus used from what you have for ships that are used in the coasting trade? No; the whole wisdom and virtue of the Consti-

tution is, that if the coasting trade is unprofitable, nevertheless it bears upon the question only upon what that ship as property now is, not that the user will receive less than if he puts it into foreign commerce and gets more, but the mere question what that property is worth as it lies as a subject of taxation in exchangeable value in the admeasurement, which is the only measure of money value to all things. If any inequality should be attempted in the constitution and laws of California in that regard, it would not be mere diversity of administration, but it would be a sacrifice of the principle of equality that the Constitution has enjoined conferring a benefit upon one that was lightened, and imposing an additional burden upon one that was overweighted.

I have said that the Constitution treats property as absolutely impersonal. It is absolutely no respecter of persons in relation to property. Whatever the laws may be that make property a lawful subject of ownership, and the conduct and use of property consistent with lawful requirements and capabilities, that respect is wholly discarded. It is of no consequence whether the property in hand for examination is owned by a firm, or by a joint association, or by a corporation, or by a man, or by a hundred men, in their natural ownership, not in the least, nor how they use it, nor how they meet, nor how they vote, because you have taken wholly from the range of discussion and diversity from the State any opportunity to make these discriminations, and to divide these burdens upon any of those considerations. It might have been wise to have left larger range for this discretion, but it has not been given.

In apportioning burdens can you, under the pretense of classification, as it is called, say that working farmers shall pay one rate of taxation and fancy or gentlemen farmers a higher rate upon their farms? You might do so perhaps usefully, either one way or the other, but that range is no longer open to you. If the working farmer owns a farm

that is worth $10,000, and the gentleman or fancy farmer owns one that is worth $10,000, then the tax is the same, and this injunction of the Constitution was a motive that no discriminations should be made in regard to uses, pursuits, preferences or disparagements. It was to be exposed to taxation in the mere aspect of value, and there could be no such discriminations.

Now, I do not remember exactly what the attempted distinction was between red-headed men and other men, as discussed in this argument, but it cannot be taken between persons at all. Property and its value to its owner, whoever he may be—I do not mean in any special advantage to himself, but as a matter of property, his ownership and his taxable burden—are the only criterion. Is there any difference under the simple and inexorable requirements of this constitution that various estates according to law, and the various management of property according to law, are permitted? Is there any distinction between a corporation and an ownership in partnership, in tenancy in common, in joint tenancy, in life or less estate and a remainder in fee? Not in the least. You cannot look, under this constitution, at all at persons or manners and methods of ownership and management. It is what lies before you as the subject you are to tax, and the tax that you are to apportion with all other taxes on all people that are to pay those taxes is the only consideration that is open.

This does not involve in the least any of the ideas of whether a franchise forms a part of the property, whether it is to be counted in the property, and whether it may be called an element of property that does not belong as a matter of fact to private persons, but belongs only to corporations.

I wish to point your Honors' attention next to how corporations stand under the constitution of California, but I submit to you that property and value is the only element under the constitution allowed, and then the question of

whether it is corporation ownership and corporation management, or private and ordinary legal combination, as having to do with the property is rejected by the tax exaction, and is a burden that the taxpayer must lawfully submit to.

A good deal is said about the discrimination between corporations in their relation to property, its aggregate, its management, its elements to combine value as earning property. All these things undoubtedly enter into property. Earning power is part of the value of property, whether it is owned by one man or by a corporation. No matter what the elements are that enter into it, it finally has to be brought down to this test: how does it affect the value of this thing on those who are to pay the tax and to bear it in the sense of public burdens that are to be distributed; and it is idle, nugatory, to pursue the question any further as to whether a particular legal form of combination, a particular faculty of managing property, a particular advantage of getting receipts and emoluments from one and not from another, and one being compatible only with large aggregations and with numerous holders and owners, has anything to do with it. The property is exposed under scientific examination, with no extraneous influences, to what it is as the subject of taxation.

Now let us look a little at the *corporation law* of California. As we all know, both in the practice of our States and in the English method which we inherited, a corporation was a franchise in the sense that it was a privilege giving advantage by its merely being a corporation, and discriminable from the common interest and common rights. So, too, to the franchise, when exercised as it came from the power and will of the Crown, an element of prerogative was communicated by the sovereign to the grantees. They stood, therefore, as a separate and distinguished element in the community, in respect of property, having an advantage, thus conferred, over the rest, and

thereby there might be properly imposed a larger burden which might be exacted in advance, in the whole, for the favor conferred in the operations of a corporation having this special privilege and using this prerogative function.

But this constitution tolerates no such privileged corporation. There is no privileged corporation, there can be no privileged corporation. That is one of the equalities that this constitution undertook to accomplish, and it provided that corporations, that is this combination of owners in regard to property and their affairs, should no longer be a matter of privilege and discrimination under the constitution and the laws of that State. They could be created only by general laws, and the reserved right of changing them could be exerted only by general laws. The moment you establish that corporations are made a matter, not of special but of common right, then you change this relation of corporations to property and the conduct of their affairs, at once, from that of privilege and prerogative to that of a common basis of one of the common modes in which property can be owned and managed.

You have, therefore, then, no means whatever under the constitution of California of making any distinction of burdens upon corporations except what shall be applicable and lawful under general laws. I do not say that the general law may not be variable in the conditions that shall be exacted in respect to common trading corporations and other forms whether of this manufacturing interest, of that navigation interest, or of railroad interests, which are called "*quasi* public corporations." Now, "*quasi* public" means, at least, that it is not a public one. If it were a public one it would not be called a *quasi* one. A railroad, then, is not a public corporation; if it were a public corporation it would need to be exempted from taxation entirely, on ordinary principles, because the State never taxes its own methods and agents of performing its own public duties. But it is a "*quasi* public corporation." That is

the only discrimination. What does that mean as bearing on taxation and a right and reason for discrimination? Why, in so far as it performs public services for public interests and for public benefits, instead of its being an occasion of burden of taxation, it ought to be a reason for limiting or reducing its taxation. In so far as it is performing a public service, that is not a reason for burdening it but for relieving it.

But we are not concerned with any speculations of that kind. We are only to measure and estimate the relations of these corporations to taxation—corporations of common right, by which all the people in California can aggregate themselves and perform these duties, none of them having any privileges over the others, either to assume the faculty or to exercise it. Through these corporations we are talking of, any of the citizens can plan a route and a structure and a management of a corporation that, so far as persons are concerned, are open to all alike.

Now where do you find under this constitution of California a right to make a discrimination of burden upon owners who are to pay the tax on property in proportion to its value, upon any other principle than what you must apply to exactions upon property, no matter whoever may own it, and for whatever use? There should be no opportunity of equivocation here. I am not arguing now about the true measure of property, or all elements entering into that measurement, or the Federal exemption, as the Chief Justice has suggested, in referring to the question whether the United States exemption was invaded by this measure of taxation. I am not quarreling with the question how value is to be made out. The rule is simple; the application may be difficult for aught I know; but what I say is, that no element concerning the measure of the tax has anything to do with it, except the value as property to the owner that is to bear the burden; nothing else is to be admitted into the regulation of the subject.

Now, what is the discrimination that we complain of? It is that these corporations are taxed both for what they own and for what they owe, and other owners of property are taxed for what they own and not for what they owe. That is a substantial difference, at least. It is not on its face an administrative distinction. So, too, the mortgagees are exempted from paying their burdens in the relation of mortgagee to these corporations, while all other mortgagees have to bear their burdens of taxation. So you burden the corporation owners upon a rule of disparity and oppression, and you relieve the mortgagees of these railroad companies upon a favor and advantage over all other mortgagees. That is not equal; nor is it compatible with the second great proposition of the constitution, that the tax shall be divided between two apparent interests, according to a division of the estates, and the property, in regard to the apparent owner of the fee, shall be reduced to what he owns above the mortgage.

All further argument, and all illustration on this point, are superfluous, on my part, after what has been said in the briefs and in the arguments of my learned associates. You must find some quarrel with the antecedent propositions made concerning this divided property, because when you recognize it as thus parted for purposes of taxation, and one-half alone can be imposed upon the one, and the other half must be imposed upon the other, in the distribution of equality among those who are to bear burdens, you must, I say, find some flaw in the argument that makes this partition, or it is too late to argue against the proposition that when you tax both to one you are overburdening more than you overburden holders in similar condition, and relieve mortgagees that you do not relieve in other situations.

Mr. Justice BRADLEY: Allow me to suggest that there is a major proposition that may have some influence on some members of the court. You contend that the clause

of the 14th amendment preventing a denial by a State to any person within its jurisdiction of the equal protection of the laws, applies to exemptions from taxation in a State. From time immemorial, beyond our memory at any rate, the States have been in the habit of making different distributions of tax among different descriptions of property and different persons. For instance, I remember in the State of New Jersey, with which I am most acquainted, we have always until recently had laws imposing a certain amount of tax on certain things, such as mills, grist mills, saw mills, and so a great many other things; and our tax law occupied several pages in the statute book every year. Does this provision of the Fourteenth Amendment intend to deprive the States entirely of the right of discriminating in taxation? Does it apply to State taxation at all? As a major proposition it seems to be assumed in your argument that it does; but I believe it is admitted that this tax was in accordance with the laws of California. If that is so, then are matters of State taxation to be brought into judgment under this clause of the Fourteenth Amendment?

Mr. EVARTS: That question was the next point in my argument. I was next to consider whether, having established the disparity, it is a disparity within the protection of the Constitution of the United States, which I understand to be your Honor's query. I have but one further observation on the topic that I was addressing myself to, and I shall come to your Honor's topic in the regular order of my examination of the subject.

Something has been said about the actual taxation exacted from these corporations, both the mortgagor and the mortgagee's interest, not being a violation in this case, and for this exaction of this distribution between mortgagor and mortgagee of the burden, because there was a covenant between the mortgagor and the mortgagee that if the latter paid the tax he should have a recourse against the mortgagor. If your Honors please, the question is solely

one of the exaction by the State. The covenant did not confer the power on the State to vary its exaction, and it did not vary its exactions, but proceeded upon its discrimination of the form of ownership, that is corporation ownership, and nothing else. But your Honors have already understood that our construction of that covenant is simply the ordinary one, that if the mortgagor does not pay the burdens that would rest upon and might exhaust or forfeit the estate, the mortgagee can pay and then have recourse. That, of course, means that the mortgagor shall pay the burdens that are lawfully imposed, and nothing else. It is not understood as a covenant which binds the owner to pay unlawful taxes, or gives the right to the mortgagee to assume unlawful taxes and charge them upon the mortgagor. But either of these is a sufficient answer, and the first one is certainly an answer in the method of the argument that I am pursuing. It does not save the inequality of the burdens imposed and exacted and to be exacted at the will of the Government, that an arrangement has been made in this particular case, between these particular plaintiffs, that would allow without injury to either of them a different rule from that which the Constitution and the laws impose.

And now, if your Honors please, if it is true in this conception that the owner in corporation property is entitled to equality of taxation, and that the estimates are to be of value and nothing else, and this disparity has occurred, then the question is whether the clause of the Constitution of the United States covers not merely corporations in its protection, but covers them in the same sense of the test, being the pressure and burden upon the private persons being the owners of the property, whether that is within the requirements of the Constitution of the United States to protect against this inequality in law. Your Honor's inquiry must come then to some limitation to be imposed upon the section of the Constitution by im-

plication, by interpretation, by construction, for there is no limitation in the Constitution in terms. That must be conceded.

Mr. Justice BRADLEY: The Constitution is the supreme law of the land. If in that clause, a few lines, is included the principle of uniformity of taxation, it will interfere with many regulations of the States, those for instance in which railroads are exempted from taxation, because I do not see why it should not have a retroactive effect. I may attach too much importance to this subject, but it should be considered.

Mr. EVARTS: I do not undervalue the force of the suggestion, and I propose to consider it. I say that this protection of equality among subjects of law in this country, which requires that no State shall deny the equal protection of the laws, is universal in its terms. It can be varied in no way, on no subject, in no proper and good result, (leaving out, of course, what follow as necessary consequences if you please from the inequality and incapacity inherent in the arrangements of government,) that does not touch principle; it does not look at the minute operations by diversity that do not spring out of the principles that are set at work by the law. Now, it was said by my learned associate, Mr. Edmunds, at a former argument on this subject of other exemptions, as follows; it is quoted in Mr. Sanderson's brief at page 98, from which I now read: "The amendment to the Constitution says no State shall deprive any person of his property. It would read with this excepted amended provision: 'No State shall deprive any person of his property without due process of law, *except it be in the form of taxation*, nor deny to any person within its jurisdiction the equal protectton of the laws, *except it be in the form of taxation*.'"

Mr. Justice MILLER: Mr. Evarts, I have heard you attentively, but I do not see any reason for saying that this clause of the California constitution deprives any person of

his property without due process of law. The State surely had the right to regulate their taxation, and it has been invariably held that where there is a reasonable mode of correcting the evils of taxation, and where, if the party sues in a court of justice, there is an opportunity for a review, we cannot inquire further.

Mr. EVARTS: I have not said a word on that subject.

Mr. Justice MILLER: You read it just now.

Mr. EVARTS: I read it argumentatively, as its reasoning on the clause to which it relates is equally applicable to the clause respecting the denial of equal protection.

Mr. Justice MILLER: I call your attention to it. The question is left, so far as the Constitution is concerned, on the proposition of denying the equal protection of the laws. With regard to that, in the same line with Judge Bradley's suggestion, let me say that we have never had a very critical analysis of those words presented to us. I do not remember that any case has yet come before us in which any State law has been held to be void under that clause. We are to consider what it is if a State shall deny to any person within its jurisdiction the equal protection of the laws. It does not say "equal laws;" it does not say "shall not deny equal laws," but shall not deny "the equal protection of the laws." That requires the enforcement of such laws as exist, equally upon all people. That may be one reading of it. The truth is that the view now contended for is very far-reaching.

Mr. EVARTS: Your Honor will do me the justice to say that I have not said anything about the clause as to depriving of property.

Mr. Justice MILLER: No, except as you read it just now.

Mr. EVARTS: It is part of one sentence.

Mr. Justice MILLER: No one said anything about it; and I do not think it is applicable to this case.

Mr. EVARTS: The question was of argument as to the limitation in regard to this very clause which your Honor

thinks should be deliberated upon, that the same method of interpretation by which taxation should be exempted from the last could be extended to the following clause. Now let us look at it and see whether it is a sound argument.

Mr. Justice FIELD: Did the law passed at the first session of the Legislature of the adoption of the constitution apply to taxation of railroads?

Mr. EVARTS: I may say that all these views on this subject are included in Mr. Sanderson's brief, with references and citations. Now, it is a perfectly fair argument, as I submit, that if you can add to the last clause in limitation of the range of equal protection of the laws "except it be in the form of taxation," it will be agreed that no interpretation of this final clause as to the equal protection of the laws would permit of a State justifying itself, where it did not make any distinctions of inequality between the enforcement and interpretation of its laws, but where it made the laws themselves discriminate as to race, color, and previous condition. Are you ready to say that this protection of this clause of the Constitution *only* goes to the point that the laws they make shall be equally applied, and equally interpreted and equally enforced, but that you can deny protection in respect of the principles of equality in the laws themselves, you can have inequalities in the laws themselves, that come to the point of a denial of equality among the persons affected? Now in the case at bar the subject of taxation, as Mr. Justice Bradley says, and as we all feel, is the only subject of inequality that we are regarding. We all know that in general the powers of taxation are unlimited, and at the will, to a general extent, of the States. While its laws of taxation do not press unequally, in the proper interpretation of the equality of protection and the equality of right, (which is defined as well as its protection, for they are commensurate and reciprocal)—if you do not find its operations to disturb that

principle, but the diversities are of mere application, as I have said before, and not of burdens *eo nomine*, with that necessary purpose to tax unequally, these incidents of necessary variation in the nature of things may not violate the clause of the Constitution. I say in this case the venom of this taxation is a denial to people owning property in one form of the application of the generality and uniformity that the constitution and laws of California, as well as the requirement of our Constitution, which certainly requires equality so far as persons are concerned. I say that here the purpose is absolute and direct to discriminate against persons in respect to their ownership of property in some situations, when the rule of equality has been established by the State in its constitution and its laws in respect of all other people.

Now, enough of illustration and of argument upon one side and the other, bearing on this question of inequality, and by that I mean that inequality that makes a discrimination at variance with natural and necessary principles of equal taxation and burden, a discrimination of inequality adjusted by *ownership* and personal stigma and oppression. If this is not that, I do not know what is. The whole motive is so, and the effect is so; and the result is that these persons owning corporation property are unprotected in such ownership by the general requirements and policy of equality of that State.

If the court please, I have now only to to consider the question of the United States relations to this property, to this organization, to these functions, and to these services. I suppose the general principles laid down as doctrines, as maxims, as uniform and absolute rules by this court as to how taxation may or may not affect an institution or operation of the United States are not in question. It is not any less true now than it was in the logical statement of Chief Justice Marshall, that the right to create carries the right to preserve, and the counterpart of the proposition

the right to tax is the right to destroy. Now, is it, can it be, a *judicial* question how much of a tax will destroy; how much will cripple; how much will disparage and distort the operations of the United States? I observe in the decisions of this court that a reasonable line is attempted to be drawn between what may be called dead property merely of these corporations in this aspect that I have commented on as the only one contemplated by the constitution of California, and that is its value with the same relation to things and values that other property in the State has. This court has had a disposition to draw a line between taxation on mere property of these public Federal organizations, whether created or adopted, and taxation burdening its franchises or functions. A suggestion has been thrown out—I think it was in an opinion of Mr. Justice Miller—that if Congress had not itself imposed a protective clause against taxation as property, it was a safe rule judicially for the court to say that that was not protected under the general principle that the United States was exempt from taxation, and from disparagement, and from burden. That I do not discuss here or now; but I submit that not one decision in this court has ever for one moment lowered the tone of this court, as announced in successive decisions by Chief Justice Marshall and his associates, that whatever does by the operation of taxation touch and feed itself out of the means and the methods and the uses and the services of the United States, *that* is inhibited by the Constitution, and without the need of any Congressional action for its exemption. Our proposition here is, that looking at these institutions in the shape of trading railroad corporations, whether springing into existence under corporate authority or under the general law of the land, of California or other States, whatever the origin, when the United States, within its power under the Constitution, has laid its hand upon the whole collected and aggregated force, whether in material measures and extension, or in

capital or in faculty or in service, that whenever a tax is laid that does burden and tend to exhaust that function, that means and that energy of the United States, this court will pronounce it to be unconstitutional without needing to find a Congressional determination that it is prohibited, politically, by the United States.

I will not occupy your time in displaying the features and the essential circumstances of these creations. Look at them in the statutes, look at them in your own decisions, recall them in your own minds; you know what they are.

Our proposition is this: that in regard to a State corporation—and we will confine it, if you please, to this single corporation—there was in California nothing but a form and manner by which citizens aggregated themselves as a part of the common right to build railroads, and this railroad company had been organized in California. It had not any railroad, it had not built any railroad, it had not any terminus that would justify building a railroad, and there was no invitation to property and to interest to build any railroad. That was all that was in existence then and there. The United States then undertook to make what, for the United States under its duty and its power and for the benefit of the whole country? It undertook to make a route and structure, and invited capital; in other words, furnished the whole means and spirit by which it called into life the possibility of this organization and efficiency, and it did it for the United States and for nothing else. It was not to benefit California; it was not to have a feeble corporation there. It was that there should be an organized system practically by wealth, by power, and by protection, which would make it a unit. It undertook to do it, and it did not find in the existence of this fiction and form of a corporation out there an impediment to it. It adopted it by invitation of California to adopt it. It framed and modeled and wielded it into an organized, living, and

working force, and the whole living and working force was to maintain it in its entirety, and to have it impregnable and inexpugnable at every vital point of it.

The CHIEF JUSTICE: We are not to be expected to overturn what has already been settled by this court as to the power of a State to tax railroads built by the aid of Congress.

Mr. EVARTS: I have excluded that whole subject from my present discussion. I am confining the State to the right of taxing the *property* merely.

The CHIEF JUSTICE: But how will you tax this railroad so far as the right of way is concerned?

Mr. EVARTS: That is part of my present argument with which I am engaged, and that is the branch of the United States interest and power over the affair. I place on one side of the line drawn between the right to tax mere property as property, and on the other the right to tax means.

The CHIEF JUSTICE: What is taxed here more than the property?

Mr. EVARTS: You might tax property, and you might by taxing property tax and destroy the means and agencies of the United States. If the two things are so combined that they cannot be separated between local and dead property upon the same level with the mass of all property of the State, general property, but must include in that a tax that claims the right to burden, the right to impede, and the right to destroy this function of the United States, then you cannot tax the property at all.

I think your Honors have expressly drawn the line between taxing as property and taxing the means of the United States. I do not understand, if the Chief Justice will allow me, that this court has undertaken to say, that by the right to tax property as severable from means, when it finds property implicated and enveloped so that it must tax means, the exempt must yield and is subject to the State.

The CHIEF JUSTICE: In the Peniston case the tax was laid on a railroad built entirely by the aid of Congress and under the charter of Congress. I think that case came from Nebraska.

Mr. EDMUNDS: It was the Union Pacific Railroad.

Mr. EVARTS: But I was going to say, as pertinent to this subject, that a tax upon their property merely, having no such necessary effect and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the States. A tax upon their operations being a direct obstruction to the exercise of Federal power, may not be.

Your Honors understand that in the Thompson case and in the Peniston case the franchise was not included in the tax.

The CHIEF JUSTICE: The tax was on the railroad and the railroad property as valued. Whether or not they valued that property according to its worth, to be used as a railroad or not, I do not now say, but it was taxed as a railroad.

Mr. EVARTS: It was taxed as property, to be valued as property merely, as I understand. Now, in the Thompson case, this is said:

"We fully recognize the soundness of the doctrine that no State has a right to tax the means employed by the Government of the Union for the execution of its powers. It will be safe in general, in reference to persons and State corporations employed in Government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

Those are the conclusive propositions of the court that are to limit me in the argument before your Honors. I do not expect to overthrow them, but I say that sedulously and carefully, circumspectly and wisely, you have excluded means from taxation; and I say if you cannot separate

property from means, but are to tax them, then the logic is that you cannot tax the property, and not the logic that you can tax the means. But that we will not discuss. Whether that line can be drawn, it is clear that it is a line difficult of application. It may be true that it may be a judicial question. It does not seem to me a very easy judicial question. When I show that this organization is for the United States service, endued and endowed by it, not endued and not endowed by the State, if it can be so taxed as that in the form and manner of this enveloping the franchise and the means in the taxation, then the State can destroy it; certainly, it can destroy it; whereas, if you observe the law, that it can only tax the tangible properties—I do not mean separated, but taking the whole line; I do not care how many pieces you chop it into, for taxation it remains entire—you do have a rule that works with greater or less success and distinction, and I want to call your Honors' attention to a vital distinction that Chief Justice Marshall drew in his original arguments as to the absolute necessity of suppressing from the beginning the touching by taxation of what was means; no matter how much else there was about what it undertook to touch, if it was an element in the vital power of the means of the corporation, it could not be taxed; and he put it upon this firm and sound reason of good sense and of wisdom in holding that aside from the other considerations of construction and of interpretation. What does he say on that subject as the reason which, I think, will strike your Honors for the absolute necessity of this court stopping at taxation which affects the means? I read from page 58 of Mr. Sanderson's brief, which is an extract of considerable length from the McCulloch case.

The CHIEF JUSTICE: Let me understand you, Mr. Evarts, on this point. Do you contend that under these decisions the valuation of the property must be confined

to the land on which the road is built, to the ties and the iron, and that it is not to be considered at all in connection with the right of the corporation to use this land and iron and ties for the purpose of transportation?

Mr. EVARTS: I do not understand that it is to be taxed as *disjecta membra*. If it can be taxed at all on the notion of property, it can be taxed on the notion of the property as it is put together.

The CHIEF JUSTICE: On its use?

Mr. EVARTS: Not in its use, but on its value put together. I agree that use of a thing is a part of its value; that I know; but you must look at it as value, and you must look at it as taxation of property that is to be put upon a basis of equality with the property, and you must make it on the principle of abstaining from imposing a taxation that does impede and does exhaust necessarily in its practice the means employed by the United States. What equality was there here? We are brought into the very questions that the United States has no protection under equalizing it with the other property. We are breaking down this discrimination about this property organized in this form from taxation under the general principles of taxation of that State. Chief Justice Marshall said in regard to this matter, after noticing the argument, that it ought to be left to the State as a part of their taxable mass, and that taxation by the State was clear and essential and all that, which we all agree to and which we appreciate and maintain to the full, as I understand it, Chief Justice Marshall says:

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of a government cannot be limited, they prescribe no limits to the exercise of this right, resting——"

Now, what does it rest on?

"resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard them against its abuse."

In other words, there is no taxation without representation, and the people govern, and the authorities that govern the State are themselves representatives of and amenable to popular revision in this very matter of unequal taxation. Then he proceeds:

"But the means employed by the Government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory."

In other words, the United States is at least not a constituent of the taxing authorities of the State of California. It is a foreign power were it not that it is a paramount power, and so not a foreign power. Whatever are its means, they must be respected.

The theory is, on the argument as I understand it, that as the State has power of taxation within its borders, and this is a frame-work of a California creation connected, intertwined with its continuous route, which, in the power and duty of the United States, is being exercised, somehow or other the corporation of the State becomes the master of the United States. Why is it not? Is not this the proposition in regard to this taxation of this corporation in California by that State? Does it not assert that this corporation of California is indomitably independent of the United States absolutely? The argument is that it is not a person within the limitation of the State's right or power, but, as the phrase is, it is a creature of the Government, and it is likened to the absolute power that the Maker has over the natural man. What have we then? Two propositions that the corporation is the master of the United States by being independent of any opportunity to protect them against this legislation; and, on the other hand, that the corporation in the State of California is an abject dependent of the California Legislature. Thus we see the strange operation, that whereas the California Legislature cannot by its authority operate upon United States means, yet it can by

the mastery of the corporation make it do its will, and then the United States must bend its head to the supremacy of the corporation of the State.

Now, if the court please, it will be seen, as I think, that not less than in the case of McCulloch *v.* Maryland, it will not do to look merely at a possible adjustment that may meet the exigencies of a State and the reasonable exigencies of a State and the paramount authority and obligation of protection by the United States of this continued route. You must look at the policy, whether upon this property as it is organized and serving the United States as its means by the power the United States has given it to serve it, by the means that have been attracted to it by the contributions of the people of the United States to make it a living and working corporation under the invitation of the United States, under the absolute right and duty of the Constitution to keep that route open, to see that the services the United States has imposed upon it are performed, and to see to the penalties which it has affixed as sanctions to its performance of its duties to the United States. It must be protected against the application of a principle which when it says it can tax so that it can dispose of and break up the unity and function of the organized part so far as it is within that State, you must conclude that if you give the right to tax you cannot withhold the right to enforce the tax; you cannot prohibit, you cannot deny the right to sell the whole from under the power and duty of the United States, because it is just as true now that the right to tax involves the right to destroy.

You cannot alter that principle, and you cannot exempt from destruction what is essential to the vigor and the maintenance of the powers and duties of the United States, unless it must be on the principle that the California authority is paramount within its limits because of the form of the enlistment and impressment, if you please, so to call it, by the United States of a California corporation in

a part of their scheme and system. We must look over the future as well as the present; draw lines whereby property, as property, shall be taxable, and the organized function and faculty shall be protected; but if you cannot adjust a discrimination, then the greater must carry with it the less. *Omne principale trahit ad se accessorium.* This State corporation must be swallowed up in the great scheme and organization of the United States; and if the property of it cannot be taxed without encroaching upon the vigor and the energy of the United States authority, the taxation must be denied. If we are to go back to the old rule of wisdom that Portia applied, if you can find the pound of flesh for taxation that does not encroach upon the vigor and the life-blood of the United States, the pound can be taken; but if by taking it one drop of the blood and vigor of the means and agency of the United States is exhausted, a paramount and final and adequate authority says that the State must forego the pound of flesh.